Digest of Hindu law, on contracts and successions

Jagannātha Tarcapañchānana, Henry Thomas ...

DIGEST

OF

HINDU LAW,

ON

CONTRACTS AND SUCCESSIONS:

WITH A

COMMENTARY

BY JAGANNÁ'T'HA TERCAPANCHÁNANA.

TRANSLATED FROM THE ORIGINAL SANSCRIT,

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THE HISTORY, ANTIQUITIES, THE ARTS, SCIENCES
AND LITERATURE OF ASIA.

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TO

THE MEMORY OF

SIR WILLIAM JONES,

THIS TRANSLATION

OF A

DIGEST,

COMPILED UNDER HIS SUPERINTENDENCE,

IS,

WITH GREAT VENERATION,

INSCRIBED

BY

THE TRANSLATOR.

THE PREFACE.

THE motives for undertaking the compilation of a New Digest of Indian Law, are so well unfolded in a letter addressed by the late Sir WILLIAM JONES to the Supreme Council of Bengal, that it will suffice to extract therefrom the sentiments expressed by that venerable Magistrate. It must ever be regretted, that the Public has lost, by his premature death, a translation, from his pen, of a Digest compiled under his direction, and an introductory Discourse, for which he had prepared curious and ample materials.* The loss is irreparable; for, no other joins to a competent knowledge of Oriental Languages, that legislative spirit and intimate acquaintance with the Principles of Jurisprudence, which he possessed in so eminent a degree.

"Nothing," says Sir WILLIAM JONES, in the address alluded to, "could be more obviously just than to determine "private contests according to those laws which the parties "themselves had ever considered as the rules of their "conduct and engagements in civil life; nor could any "thing be wiser than, by a legislative act, to assure the "*Hindu* and *Muselman* subjects of Great Britain, that the "private laws which they severally hold sacred, and a "violation of which they would have thought the most "grievous oppression, should not be superseded by a new "system, of which they could have no knowledge, and "which they must have considered as imposed on them by "a spirit of rigour and intolerance. So far the principle of

* See his last Anniversary Discourse as President of the Asiatic Society, Vol. IV, p. 176

"decision between the native parties in a cause appears "perfectly clear: but the difficulty lies (as in most other "cases) in the application of the principle to practice; for "the *Hindu* and *Muselman* laws are locked up for the most "part in two very difficult languages, Sanscrit and Arabic, "which few Europeans will ever learn, because neither of "them leads to any advantage in worldly pursuits; and if "we give judgment only from the opinions of the native "lawyers and scholars, we can never be sure that we have "not been deceived by them. It would be absurd and "unjust to pass an indiscriminate censure on a considerable "body of men; but my experience justifies me in declaring, "that I could not, with an easy conscience, concur in a "decision, merely on the written opinion of native lawyers, "in any cause in which they could have the remotest inter-"est in misleading the Court: nor, how vigilant soever we "might be, would it be very difficult for them to mislead "us; for a single obscure text, explained by themselves, "might be quoted as express authority, though perhaps, in "the very book from which it was selected, it might be dif-"ferently explained, or introduced only for the purpose of "being exploded. The obvious remedy for this evil had "occurred to me before I left England, where I had "communicated my sentiments to some friends in Parlia-"ment, and on the Bench in Westminster Hall, of whose "discernment I had the highest opinion; and those "sentiments I propose to unfold, in this letter, with as "much brevity as the magnitude of the subject will admit. "If we had a complete Digest of *Hindu* and *Muhammedan* "laws, after the model of JUSTINIAN's inestimable Pandects, "compiled by the most learned of the native lawyers, with "an accurate verbal translation of it into English; and if "copies of the work were reposited in the proper offices of "the *Sedr Diwáni Adálat*, and of the Supreme Court, that "they might occasionally be consulted as a standard of

"justice, we should rarely be at a loss for principles at least, "and rules of law, applicable to the cases before us, and "should never perhaps be led astray by the *Pandits* or "*Maulavis*, who would hardly venture to impose on us, when "their imposition might so easily be detected. The great "work, of which JUSTINIAN has the credit, consists of texts "collected from law-books of approved authority, which in "his time were extant at Rome: and those texts are digested "according to a scientifical analysis; the names of the original "authors, and the titles of their several books, being "constantly cited, with references even to the parts of "their works from which the different passages were selected. "But although it comprehends the whole system of juris-"prudence, public, private, and criminal, yet that vast "compilation was finished, we are told, in three years: it "bears marks, unquestionably, of great precipitation, and "of a desire to gratify the Emperor by quickness of dispatch; "but, with all its imperfections, it is a most valuable mine "of juridical knowledge. It gives law at this hour to the "greatest part of Europe; and, though few English lawyers "dare make such an acknowledgment, it is the true source "of nearly all our English laws that are not of a feudal "origin. It would not be unworthy of a British Govern-"ment to give the Natives of these Indian Provinces a "permanent security for the due administration of justice "among them, similar to that which JUSTINIAN gave to his "Greek and Roman subjects; but our compilation would "require far less labour, and might be completed with far "greater exactness, in as short a time; since it would be "confined to the laws of Contracts and Inheritances, which "are of the most extensive use in private life, and to which "the Legislature has limited the decisions of the Supreme "Court in causes between native parties: the labour of the "work would also be greatly diminished by two compilations

"already made in Sanscrit and Arabic, which approach "nearly, in merit and in method, to the Digest of JUSTINIAN. "The first was composed a few centuries ago by a *Bráhman* "of this province, named RAGHUNANDANA, and is comprised "in twenty-seven books at least, on every branch of *Hindu* "law : the second, which the Arabs call the Indian Deci- "sions, is known here by the title of *Fetáwíi Áálemgiri,* "and was compiled, by the order of AURANGZIB, in five "large volumes, of which I possess a perfect and well "collated copy. To translate these immense works, would "be superfluous labour; but they will greatly facilitate the "compilation of a Digest on the Laws of Inheritance and "Contracts; and the Code, as it is called, of *Hindu* law, "which was compiled at the request of Mr. HASTINGS, will "be useful for the same purpose, though it by no means "obviates the difficulties before stated, nor supersedes the "necessity, or the expedience at least, of a more ample "repository of *Hindu* laws, especially on the twelve different "contracts, to which ULPIAN has given specific names, and "on all the others, which, though not specifically named, "are reducible to four general heads. The last-mentioned "work is intitled *Vivádárnava Sétu,*(1) and consists like the "Roman Digest, of authentic texts, with the names of their "several authors regularly prefixed to them, and explained, "where an explanation is requisite, in short notes, taken "from commentaries of high authority : it is, as far as it "goes, a very excellent work; but though it appear ex-

(1) The composition of this work was proposed as early as the 18th of March 1773 at the opening of the Court of Sudder Dewanny Adawlut of Bengal, and in December in the same year it was reported to the President that the Digest was nearly completed in the Sanscrit language, and that a translation was being made into Persian for the purpose of being again translated into English. Early in the following year, 1774, Warren Hastings transmitted a specimen of the English version to the Court of Directors : and in the same year, Mr. Halhed published the entire work in English under the title of "A Code of Gentoo Laws."—For the reasons given by Sir William Jones, this is not considered a work of any authority, and reference to it is seldom made in judicial proceedings

" tremely diffuse on subjects rather curious than useful, and " though the chapter on Inheritances be copious and exact, " yet the other important branch of jurisprudence, the Law " of Contracts, is very succinctly and superficially discussed, " and bears an inconsiderable proportion to the rest of the " work. But, whatever be the merit of the original, the " translation of it has no authority, and is of no other use " than to suggest inquiries on the many dark passages " which we find in it : properly speaking, indeed, we cannot " call it a translation ; for though Mr. HALHED performed " his part with fidelity, yet the Persian interpreter had " supplied him only with a loose injudicious epitome of the " original *Sanscrit*, in which abstract many essential pas- " sages are omitted, though several notes of little conse- " quence are interpolated, from a vain idea of elucidating " or improving the text."*

Besides the great work of RAGHUNANDANA abovementioned, many other Digests have been compiled by *Hindu* lawyers ; which, like his, consist of texts collected from the Institutes attributed to ancient legislators, with a gloss, explanatory of the sense, and reconciling seeming contradictions, to fulfil the precept of their great lawgiver, " When there are " two sacred texts apparently inconsistent, both are held " to be law ; for both are pronounced by the Wise to be " valid and reconcileable."† From various Digests, and from commentaries on the institutes of law, the present Digest has been compiled ; and the venerable author, JAGANNAT'HA, has added a copious commentary, sometimes

* The letter from which this extract is taken, is dated 19th March 1788. On the same date, the then Governor-General, MARQUIS CORNWALLIS, with the concurrence of the Members of Council, accepted the offer in terms honourable to the proposer, and expressive of the most liberal sentiments. "The object of your proposition," they say, " being to promote a due administration of justice, it becomes interesting to humanity ; " and it is deserving of our peculiar attention, as being intended to increase and secure " the happiness of the numerous subjects of the Company's provinces."

† MENU, Chap. II, v. 41.

indeed pursuing frivolous disquisitions, but always fully explaining the various interpretations of which the text is susceptible. In restricting this compilation to the law of contracts snd successions, he has omitted the law of evidence, the rules of pleading, the rights of landlord and tenant, the decision of questions respecting boundaries, with some other topics, which should be likewise treated for the purpose of assisting courts of civil judicature in deciding private contests according to the laws which the *Hindu* subjects of Great Britain hold sacred. The body of Indian Law comprises a system of duties religious and civil. Separating the topic of religious duties, and omitting ethical subjects, *Hindu* lawyers have considered civil duties under the distinct heads of private contests and forensic practice: the first comprehends law private and criminal; the last includes the forms of judicial procedure, rules of pleading, law of evidence written and oral, adverse titles, oaths, and ordeal. The translation of MENU has sufficiently made known the criminal law of the *Hindus*, which is now superseded by the *Muhammedan* system: but another head of private contests, in which, under the name of disputes concerning boundaries, the rights of husbandmen are examined, contains matter both curious and useful; practical law, especially the system of evidence, must be sometimes consulted in the provincial courts, which are not governed by English law; and the rules of special pleading have been pronounced excellent by one whose opinion has great weight.*

The *D'herma Sástra*(2) or sacred code of law, comprising

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* Sir William Jones, in a manuscript note.

(2) The *Dherma Sastra* may be conveniently divided into three classes:

I. The *Smritis*, or Text books, which are the foundation of all Hindu law.

II. The *Vyakhyana*, or Glosses and Commentaries upon the *Smritis*, many of which partake of the nature of Digests.

III. The *Nibandhana Grandha*, or Digests properly so called, either of the whole body of the Law or of particular portions thereof, collected from the text books and their commentators.

all the subjects abovementioned, is called *Smriti,* what was remembered, in contradistinction to *Sruti,* what was heard. By these names it is signified, that the *Véda* has preserved the words of revelation, while the system of law records the sense expressed in other words. It has been promulgated by thirty-six ancient Sages, who are named in three verses of the *Padma purána* ; YAJNYAWALCYA, however, mentions no more than twenty : on the other hand, Sages are cited in law tracts, whose names do not appear in either list.(3)

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(3) RAMA KRISHNA, a modern Hindu writer, gives a list of thirty-nine sages, of whom nine are new names, not found in the lists given by YAJNYAVALKYA and the *Padma Purána.*

The following is a list of all the sages or *Rishis,* who are recognised as authors of distinct codes of Hindu law and ritual. YAJNYAVALKYA mentions twenty names, viz. :—

1. *Manu.*	8. *Yama.*	15. *Sankha.*
2. *Atri.*	9. *Apastamba.*	16. *Likhita.*
3. *Vishnu.*	10. *Samvarta.*	17. *Daksha.*
4. *Harita.*	11. *Katyayana.*	18. *Gautama.*
5. *Yajnyavalkya.*	12. *Vrihaspati.*	19. *Satatapa.*
6. *Usanas.*	13. *Parasara.*	20. *Vasishta.*
7. *Angiras.*	14. *Vyasa.*	

PARASARA enumerates also twenty authors ; but instead of *Yama, Vrihaspati,* and *Vyasa* in the above list, he gives the names of *Kasyapa, Gargya,* and *Prachetas.*

The following seventeen names given in the *Padma purána,* do not occur in the preceding list :—

21. *Marichi.*	27. *Visvamitra.*	33. *Jabali.*
22. *Pulastya.*	28. *Devala.*	34. *Sumantu.*
23. *Prachetas.*	29. *Rishyasringa.*	35. *Paraskara.*
24. *Bhrigu.*	30. *Gargya.*	36. *Laughakshi.*
25. *Narada.*	31. *Baudhayana.*	37. *Kuthumi.*
26. *Kasyapa.*	32. *Paithinasi.*	

RAMA KRISHNA'S catalogue contains the following nine names which are not recorded in either of the lists above given :—

38. *Agni.*	41. *Jatakarna.*	44. *Budha.*
39. *Chyavana.*	42. *Pitamaha.*	45. *Satyayana.*
40. *Ch'hagaleya.*	43. *Prajapati.*	46. *Soma.*

To the above forty-six names some writers add five more, increasing the number to fifty-one ; the new names are :—

47. *Lohita.*	49. *Chidambara.*	51. *Sandilya.*
48. *Kanva.*	50. *Bharadvaja.*	

MR. BORRADAILE mentions the names of ten sages as authors of Law Institutes. (Preface to *Vyavahara Mayukhu.*)

52. *Asvalayana.*	56. *Dhaumya.*	59. *Vatsa.*
53. *Atreya.*	57. *Naciketu.*	60. *Vyaghra.*
54. *Krishnajini.*	58. *Markandeya.*	61. *Satyavrata.*
55. *Datta.*		

Reference to the Institutes of these authors is seldom met with.

Treatises, attributed to these ancient philosophers, are extant, which internal evidence proves to be, though probably composed by other persons, as the *Purânas*, written by many different authors, are all ascribed to VYASA; for, the dramatic form which has been given to most of those tracts, and the use of the third person when the reputed author is named in his code, extort a confession from commentators, that the institutes must have been composed by pupils from the recollection of precepts delivered by their holy instructor. Without examining whether the authenticity of codes now extant be thus sufficiently established, the *Hindus* revere those institutes, as containing a system of sacred law confirmed by the *Vêda* itself, in a text thus translated by Sir WILLIAM JONES according to the gloss of SANCARA: "God, having created the four classes, had not yet completed his work; but, in addition to it, lest the royal and military class should become insupportable through their power and ferocity, he produced the transcendent body of law; since law is the king of kings, far more powerful and rigid than they: nothing can be mightier than law, by whose aid, as by that of the highest monarch, even the weak may prevail over the strong."

Concerning the birth and actions of the legislators, we know little more than what is recorded in the *Purânas;* and the whole of what is there recorded, belongs either to heroic history, or to mythology. Such topics would be here misplaced: but a short notice of the institutes, commentaries, and digests, which have been used by the compiler, may be fitly subjoined to introduce to the reader's acquaintance the authorities cited in the work.

The laws of MENU, who is revered by *Hindus* as the

It may be mentioned in this place that several *Smritis* are sometimes ascribed to the same author: his greater or lesser Institutes (*vrihat* or *laghu*,) or a later work of the author when old. (*vriddha*.)

Nearly all the Dherma Sastras attributed to the Sages abovenamed are extant.

first of legislators,[4] have already appeared in the English language.[5] Among the numerous commentaries on his institutes, the most esteemed have been noticed in the preface to the translation of his work, namely a commentary by MED'HATIT'HI son of BIRASWAMI BHATTA, which having been partly lost, has been completed by other hands at the court of MADANA PALA, a prince of *Dig'h*; another commentary by GOVINDA RAJA; a third by D'HARANID'HERA; and the celebrated gloss of CULLUCABHATTA, entitled *Menwart'ha Muctávalí*, and some others, are occasionally quoted in this Digest.[6]

ATRI, not named among legislators in the *Padma purána*, is second in the list of YAJNYAWALCYA; he is one of

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(4) Menu, the author of the Institutes, is surnamed *Svayambhuva*, i. e., issuing from the self-existent. He is regarded to be the first of the seven Menus, who governed the world, Brahma himself is related to have revealed the laws contained in the Institutes to his offspring: the Rishi Bhrigu subsequently promulgating the ordinances thus communicated by divine revelation.

(5) Sir WILLIAM JONES' translation of the Institutes of Menu was first published in Calcutta in 1794. It has been incorporated also in the works of Sir William Jones, published by Lord Teignmouth,—Vol. 3, p. 51, edition 1799: and vol. 7, p. 75, edition 1807. In 1825, a second edition of this translation was published in 2 vols.—edited by Sir Graves C. Haughton. Another translation by an anonymous author appeared in Calcutta,—in 2 vols., 1830. A third edition of Sir William Jones' translation, edited by the Rev. P. Percival, was published at Madras in one volume. A French translation of the Institutes of Menu by M. Loiseleur Deslongchamps appeared in Paris in 1833.

(6) These four commentaries on the laws of Menu are all in considerable repute. Sir William Jones, however, characterizes the first as prolix and unequal, the second as concise but obscure; the third as often erroneous; reserving for the fourth, i. e., the gloss of Cullucabhatta, the praise of being "the shortest, yet the most luminous; the least ostentatious, yet the most learned; the deepest, yet the most agreeable, commentary ever composed on any author ancient or modern, European or Asiatic."

In addition to the commentaries specified above, mention is made of several other glosses on the Code of Menu: such as the *Manvarta Chandrika*, by Raghavananda, made use of by M. Deslongchamps. The commentary of Bhaguri. The *Madhava* of Sayanacharya; and the *Nandarajkrit*, by Nandaraja: both, mentioned by Steele: and lastly, the *Kamadhenu*, which Colebrooke has not seen, but which is often cited by Stridharacharya in his *Smritisara*.

the ten lords of created beings,* and father of DATTATREYA, DURVASAS and SOMA : a perspicuous treatise in verse, attributed to him, is extant. VISHNU, not the Indian divinity, but an ancient philosopher who bore this name, is reputed author of an excellent law treatise in verse ; and HARITA is cited as the author of a treatise in prose : metrical abridgments of both works are also extant.

YAJNYAWALCYA, grandson of VISWAMITRA, is described, in the introduction of his own institutes, as delivering his precepts to an audience of ancient philosophers assembled in the province of *Mit'hilá.* These institutes have been arranged in three chapters, containing one thousand and twenty-three couplets.(7) An excellent commentary, entitled *Mitácsharú,* was composed by VIJNYANESWARA, a hermit, who cites other legislators in the progress of his work, and expounds their texts, as well as those of his author, thus composing a treatise which may supply the place of a regular Digest : it is so used in the province of *Benares,* where it is preferred to other law tracts ; but some of his opinions have been successfully controverted by late writers. Following the arrangement of his author, he has divided his work into three parts : the first treats of duties ; the second, of private contests and administrative law ; the third, of purification, the orders of devotion, penance and so forth. Another commentary on YAJNYAWALCYA by DEVABOD'HA, and one by VISWARUPA, are occasionally cited. The *Dípacalicá* by SULAPANI, which is likewise a commentary on

* MENU, Chap. I, v. 35.

(7) The text of YAJNYAVALKYA was printed in Calcutta in 1812, with the commentary entitled the *Mitakshara* of VIJNYANESWARA ; the sixth Chapter of this valuable work treating of Inheritance, has been translated by MR. COLEBROOKE, and printed at Calcutta, 1810 ; Madras, 1822. A third edition is in the press, edited by MR. W. STOKES, of the Inner Temple. The text with a German translation has been published by PROFESSOR STENZLER, at Berlin, 1849.

YAJNYAWALCYA, is in deserved repute with the *Gauríya* school.(8)

USANAS is another name of Sucra, the regent of the planet Venus: he was grandson of BHRIGU: his institutes in verse, with an abridgment, are extant; as is a short treatise containing about seventy couplets ascribed to ANGIRAS, who holds a place among the ten lords of created beings, and, according to the *Bhágavata*, became father of UTAT'HYA and of VRIHASPATI in the reign of the second MENU. A short tract containing a hundred couplets is attributed to YAMA, brother of the seventh MENU, and ruler of the world below: CULLUCABHATTA wrote a gloss on his institutes. APASTAMBA was author of a work in prose, which is extant, with an abridgment in verse: but the metrical abridgment only of the institutes of SAMVERTA is among the tracts which were collected for the present compilation. CATYAYANA is author of a clear and full treatise on law, and also wrote on grammar and on other subjects. VRIHASPATI, regent of the planet Jupiter, has a place among legislators; he was son of ANGIRAS according to one legend, but son of DEVALA according to another: the abridgment of his institutes, if not the code at large, is extant. PARASARA, grandson of VASISHT'HA, is termed the highest authority for the fourth age: a work attributed to him is extant, with a commentary by MADHAVACHARYA. VYASA, son of PARASARA, is reputed author of the *Purànas*, which, with some works more immediately connected with law, are often cited in his name. SANC'HA and LIC'HITA are the authors of a joint work in prose, which has been abridged in verse: their separate tracts in verse are also extant. Heroic history notices two personages of the name of

(8) See further as regards YAJNYAVALKYA and his commentators, MR. COLEBROOKE's preface to his translation of *Mitakshara*, on Inheritance.

DACSHA ; one son of BRAHMA, the other son of PRACHETAS : a similar legend on the marriage of their daughters, and which is evidently allegorical, is told of both : it does not appear certain which of them is the legislator ; however, a law treatise in verse is dignified with this name. GAUTAMA, son of the celebrated founder of a rational system of metaphysics and logic, is named in every list of legislators, although texts are cited in the name of his father GOTAMA, the son of UTAT'HYA : an elegant treatise in prose is ascribed to GAUTAMA. SATATAPA is author of a treatise on penance and expiation, of which an abridgment in verse is extant. VASISHT'HA, the preceptor of the inferior gods, and one of the lords of created beings, is the last of twenty legislators named by YAJNYAWALCYA : his elegant work in prose mixed with verse is extant.

In the *Padma purâna* the number of thirty-six legislators is completed by the following names : MARICHI, the father of CASYAPA ; PULASTYA, father of AGASTYA ; PRACHETAS son of PRACHINAVARHISHA by a daughter of the Ocean, and father of DACSHA ; BHRIGU, son of MENU ; NAREDA, begotten by BRAHMA, and again by CASYAPA, on the wife of DACSHA ; CASYAPA, son of MARICHI ; VISWAMITRA, a Sage among military men, who became a *Brâhmana* through his devotion ; DEVALA, son of VISWAMITRA, and grandfather of the celebrated grammarian PANINI, but according to another legend great-grandson of DACSHA ; RISHYASRINGA, son of VIBHANDACA by a miraculous birth from a doe ; GARGYA, the astronomer ; BAUD'HAYANA, who is frequently cited by lawyers ; PAIT'HINASI, who is also cited in this Digest ; JABALI, SUMANTU, PARASCARA, LOCACSHI and CUT'HUMI, whose names rarely occur in any compilation of law.

Besides these legislators, DHAUMYA, the priest of the *Pandavas,* and author of a commentary on the *Yajurveda,*

Aswalayana, who wrote on the detail of religious acts and ceremonies, and Datta, the son of Atri, are cited in this compilation; and Bhaguri is quoted for a gloss on the institutes of Menu.

The *Rámáyana* of Valmici, the earliest epic poem, is cited as nearly equal in authority with the poems on mythology and heroic history, which are ascribed to Vyasa. For the purpose of elucidation, the compiler sometimes quotes metaphysical rules and ethical maxims, and, with particular veneration, the sublime works of Udayanacharya, the reviver of the rational system of philosophy. For the same purpose he has made some use of the dramas and epic poem of Calidasa, and lyric poetry of Jayadeva. The treatises and commentaries of lawyers, which have been consulted by the compiler, are numerous.

The *Ch'handóga parisishta* by Cesava Misra, a celebrated philosopher, and its commentary named *Parisishta pracás'a*, are works of great authority; they treat of the duties of priests, especially those who are guided in their religious ceremonies by the *Sámavéda*. A more general treatise, entitled *Dwita parisishta*, is the work of the same author, a native of *Mit'hila*. The *Vivàda Retnacara*, a Digest highly esteemed by the lawyers of *Mit'hilá* or *Tírabhucti*, was compiled under the superintendence of Chandeswara, minister of Harasinhadeva king of *Mit'hilá*. Chandeswara is reputed author of other tracts. The *Vivàda Chintámeni*, *Vyavahára Chintámeni*, and other works of Vachespati Misra, are also in high repute among the lawyers of *Mit'hilá*. No more than ten or twelve generations have passed since he flourished at *Semaul* in *Tirhút*. The *Vivàda Chandra* and other works composed by Lac'himadevi are likewise much respected in the *Mit'hilá* school. This learned female set the name of her nephew

MISARU MISRA to all her compositions on law and philosophy, and took the titles of her work from the tenth reigning prince, CHANDRASINHA, grandson of HARASINHADEVA. The *Viváda Chandra* is never cited by name in the new Digest; although it has been frequently copied in the anonymous commentary.

The *Vyavahára-tatwa, Dáya-tatwa,* and other works of RAGHUNANDANA *Bandyaghatiya,* are highly respected by the *Gauríya* school.(9) This great lawyer is frequently cited by the title of *Smárta-bhattácharya,* as VACHESPATI MISRA is distinguished by his family name of MISRA. The *Dwaita nirnaya* of VACHESPATI BHATTACHARYA, a treatise on questions of law, is often quoted by the compiler of the new Digest, who has only once named him: in every other instance he cites him by the appellation of "my venerable grandfather." In allusion to the similarity of their names, this lawyer adopted a title for his work from a similar treatise by VACHESPATI MISRA. The compiler of the new Digest also quotes his maternal grandfather's brother by the appellation of "modern VACHESPATI."

JIMUTAVAHANA, who gave his name to a Digest entitled *D'herma retna,* is said to have reigned on the throne of SALIVAHANA.(10) He is probably the same with the son of JIMUTACETU, a prince of the race of *Silara,* who reigned at *Tagara.** The chapter on Inheritance is extant, with a

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(9) The *Tatwas* of RAGHUNANDANA were printed at Serampore in 1835, and again at Calcutta in 1840. These *Tatwas* treat severally of a single topic, as the *áchára tatwa,* on observances; *udvaha tatwa,* on marriage; *vyavahára tatwa,* on jurisprudence; *dáya tatwa,* on inheritance, and the like.

(10) The treatise of JIMUTAVAHANA on successions, well known as the *Dayabhaga* or portion of Ineritance, was translated into English by MR. COLEBBROOKE, and printed at Calcutta in 1810; re-printed in Madras in 1822; a third edition is in the press and will be shortly out. For futher particulars about JIMUTAVAHANA, the reader is referred to the preface of MR. COLEBROOKE.

* Asiatic Researches, Vol. I, p. 357 and 361.

commentary by SRI CRISHNA TERCALANCARA, a modern writer of no great authority, who belongs to the *Gauríya* school, and is often cited.

HELAYUD'HA, the spiritual adviser of LACSHMANASENA, (a renowned monarch who gave his name to an era of which six hundred and ninety-two years are expired), is the author of the *Ṅayáyá servaswa*, *Bráhmana servaswa*, *Pandita servaswa*, and many other tracts on the administration of justice, and on the duties of classes and professions. He was son of D'HANANJAYA the celebrated lexicographer ; and his brothers PASUPATI and ISANA are authors of rituals, the first for obsequies, &c., the second for daily acts of religion.

LACSHMID'HARA composed a treatise on administrative justice, by command of GOVINDA CHANDRA a king of *Cási*, sprung from the *Vástava* race of *Cáyast'has*. He is likewise author of a Digest entitled *Calpateru*, which is often cited. By command of the same prince, NARASINHA, son of RAMACHANDRA the grammarian and philosopher, composed a law-tract entitled *Góvindárnava*, and several other treatises.

SRI CARACHARYA and his son SRINAT'HACHARYA CHURAMENI were both celebrated lawyers of the *Mit'hilá* school. The first wrote a treatise on Inheritances ; the last is author of a tract on the duties of the fourth class, which is entitled *Achárya chandricá*. I have not seen the other works of these authors.

The *Smrĭtisára*, or, at full length, *Smrĭtyarthasára*, by SRID'HARACHARYA, a priest of the *Dravir* tribe, is a treatise on religious duties, in which questions of civil duty are incidentally introduced. He cites the *Cámad'hénu*, a law-tract said to be a gloss on MENU ; but which, not having

seen the book, I cannot affirm. The *Pradípa, Cálpadruma,* and *Calpalatá,* works of which I can give no other, notices are cited in the *Smrïtisára.*

The *Madana Párijáta,* on civil duties, is the work of VISWESWARABHATTA, and derives its name from MADANA PALA, a prince of the *Ját* race, who reigned at *Cásht'hana gar* or *D'íah.* This work, which is sometimes quoted in the name of MADANA PALA himself, cites, among other authorities, the *Sáparárca* and *Smrïtichandrica,* which do not appear to be otherwise known, and the *Hémádri,* which is occasionaly quoted in the new Digest.

SULAPANI, a native of *Mit'hilá,* who resided at *Sáhuria* in Bengal, wrote a treatise on penance and expiation, which is in great repute with both schools. His commentary on YAJNYAWALCYA, entitled *Dípacalicá,* has been already noticed. BHAVADEVA BHATTA, also called BALABALABHI BHUJANGA, was author of several treatises on religious duties. These, with the rituals of the same author, are much consulted in Bengal and in the southern provinces of India. JITE'NDRYA is often cited in the *Mitácshará,* and sometimes in the new Digest. GOYICHANDRA, GRAHESWARA, D'HARESWARA, BALARUPA, HARIHARA, MURARI MISRA, and many others, have been occasionally consulted.

Among modern Digests the most remarkable are, the *Vivadarnava sétu,* compiled by order of Mr. HASTINGS; the *Vivada saranava,* compiled at the request of Sir WILLIAM JONES, by SERVORU TRIVEDI, a lawyer of *Mit'hilá;* and the *Vivàda bhangárnava,* by JAGANNAT'HA which is now translated.

On this translation I shall briefly observe, that the version of many texts come from the pen of Sir W. JONES;

for most of the laws quoted from MENU are found in his translation of the *Mánava d'herma sástra,* and other texts had been already translated by him when perusing the original Digest formerly compiled by order of Mr. HASTINGS. It has become my part to complete a translation of the new Digest of *Indian* law. Selected for this duty by Sir JOHN SHORE, whose attention extended to promote the happiness of the native inhabitants of the provinces which he governs, and to encourage the labours of the literary society over which he presides, is no less conspicuous than his successful administration of the British interests in India, I have cheerfully devoted my utmost endeavours to deserve the choice by which I was honoured : nothing, which diligence could effect, has been omitted to render the translation scrupulously faithful; and to this it has been frequently necessary to sacrifice perspicuous diction. The reader, while he censures this and other defects of a work executed in the midst of official avocations, will candidly consider the obvious difficulties of the undertaking. Should it appear to him that much of the commentary might have been omitted without injury to the context, or that a better arrangement would have rendered the whole more perspicuous, he will remember, that the translator could use no freedom with the text, but undertook a verbal translation of it : what has been inserted to make this intelligible, is distinguished by Italics, as was practised by Sir WILLIAM JONES in his version of MENU and of the *Sirájiyyah ;* in very few instances has any greater liberty been taken, except grammatical explanations and etymologies, which are sometimes though rarely omitted, or abridged, where a literal version would have been wholly unintelligible to the English reader. In the orthography of *Sanscrit* words, the system adopted by Sir W. JONES has been followed. To obviate the necessity of referring to the first volume of the Asiatic Researches, where that system was proposed, an explanatory note is

subjoined. This, with an index, and a few scattered annotations, which have been added, may prove sufficient to assist the occasional perusal of a work intended to disseminate a knowledge of Indian law, and, serving as a standard for the administration of justice among the *Hindu* subjects of *Great Britain*, to advance the happiness of a numerous people.

H. T. COLEBROOKE.

MIRZAPOOR,
17*th December* 1796.

PUBLISHER'S PREFACE.

THIS valuable work was compiled by a learned Bengal Pundit, JAGANNÁT'HA TERCAPANCHÁNANA, at the suggestion and under the superintendence of Sir WILLIAM JONES, and was translated from Sanscrit into English by Mr. HENRY THOMAS COLEBROOKE in 1796. In the following year, it was printed, in four volumes, at the Press of the Honorable the East India Company at Calcutta; and, in 1801, it re-appeared as a second edition in three volumes, when it was printed at the Oriental Press and published in London. It consists of texts collated from the Codes, extant in the Sanscrit language only, of the wisest Lawgivers of India, on the subject of the Hindu Law of Contracts and Successions, with a copious commentary, by the compiler, based on the expositions of learned and skilful Jurists of earlier times; and forms the most comprehensive and perspicuous body of Hindu Law that has hitherto appeared in the English language.

As the work is now scarcely to be met with anywhere, having been long out of print, and encouraged by the success I have met with in my endeavours to reproduce, in a convenient and compact form, standard works on Hindu Law and Indian subjects, I have ventured to issue a third edition on my own risk and responsibility; and thereby to place within the reach of all those who may be interested in the subject, "a mine of juridical learning," as COLEBROOKE'S Digest has been, not undeservedly, characterized, "throwing light upon every question on which it treats," notwithstanding its defects in some respects.

It was my intention to have supplemented the present edition with foot-notes explanatory and otherwise of the text, and, with this view, I secured the services of an able and experienced judicial officer, whose notes appear on the first 200 pages distinguished from the rest by the affix "Editor;" but, owing to want of time on his part to prosecute the undertaking as expeditiously as circumstances demanded and other unavoidable impediments which caused consi-

derable delay in passing the work through the Press, I abandoned this design and re-printed the remaining portion of the work *verbatim* from the second edition. This is to be the less regretted as the stereotyped character of Hindu Law and the wise policy of the British Indian Legislature in abstaining to interfere, as far as possible, with the institutions of the people, leave little room for re-editing. Portions of the work, it is true, have been rendered obsolete by Statutary Law, and the Decisions of Indian Courts have illustrated and amplified many of the doctriues contained in it, and to have noticed these in their proper places would have been an advantage, yet still such thorough revision would involve considerable more delay than the present demand for books of this description warrants my incurring. The work, as a standard authority, even in its present form, will be doubtless acceptable to the legal public; and considering all circumstances, I have deemed it prudent to push forward its printing as fast as possible and to publish each volume as it was ready.

In regard to typographical execution, the present edition is decidedly superior to its predecessor, which was printed about sixty-three years ago. The subject-matter of each section is given at the head of the page to facilitate reference, and the work itself is presented in a more compact form by reducing its bulk from three to two complete volumes.

COLEBROOKE has been much esteemed as a Sanscrit scholar, and many of the most valuable papers which appeared in the *Asiatic Researches*, were contributed by him. A list of these and of his other works is given at page 316 of volume 2 of the Biographical Division of KNIGHT'S *English Cyclopædia.*

PUBLISHER.

MADRAS, *July* 1864.

PREFACE TO THE FOURTH EDITION.

The third edition of this standard Oriental Law work having been exhausted, the Publishers have much pleasure in issuing a *fourth.*

August 1874. *The Publishers.*

MEMOIR.

Colebrooke, Sir Henry Thomas, was born in London in 1765. His father, Sir George Colebrooke, Bart., was several times Chairman of the East India Company. As a boy, he was of a quiet, retiring disposition; was distinguished for an extreme fondness for reading; and had a wish to be placed in the church. He pursued his early studies under a tutor, at his father's house, till the age of fifteen; at which time he was as far advanced as many are when they leave the Universities. At seventeen, he was appointed to a writership in the Civil Service of Bengal; and embarked at Portsmouth soon after the sinking of the *Royal George* at Spithead, which melancholy circumstance he witnessed.

On reaching India, he was placed in a subordinate capacity in the Board of Accounts, which he held during the remainder of his stay at Calcutta. It is singular that one who ultimately became master of perhaps the most difficult of all Oriental tongues, should have told his father, in a letter written during his first year's sojourn in India, that there was no danger of his applying too intensely to languages; that the Persian was too dry to entice; and that he sought the acquisition of that and the Hindustani very leisurely.

Mr. Colebrooke's first letters from India expressed something of discontent at his situation. The discussions which were then going on at home relative to the constitution of our Indian empire, and the general opinion which obtained that the Company would be deprived of their political patronage, seem to have led him to think of returning to Europe, and seeking a new profession; for a while he entertained thoughts of turning farmer, and settling in the country. In one of his letters, he remarked that it was easy to make oneself comfortable in India; but that it was seldom done,

because of the notion of returning early to Europe. He observed, also, that India was no longer a mine of gold; every one was disgusted; and all, whose affairs permitted, abandoned it as soon as possible. In a subsequent letter, however, he retracts some of his complaints against the country, his situation, &c., and admits that the only solid objection to India is its great distance from Europe.

In 1786, he was appointed Assistant Collector of Revenue in Tirhoot, in which department he remained for nearly nine years. While there he acquired a great taste for field sports, and prided himself on being an excellent shot; nor did he relinquish those animating pursuits till he was removed to a station where no game was to be found. While at Tirhoot, his sporting and official avocations left him little time for literary pursuits; and although his father constantly pressed him for information regarding the literature and religion of the East, the son as constantly pleaded want of time for such investigations. Some of the excuses given in his letters, at this period, are remarkable, as coming from one who was afterwards so zealous an Orientalist. He styles Wilkins, "Sanscrit mad;" the *Asiatic Miscellany*, "a repository of nonsense;" and the Institutes of Akbar, "a dunghill, in which perhaps a pearl or two might be found." The bent of his mind, at this time, inclined towards the politics of India.

In 1789, he was made Assistant Collector at Purneah; his efficiency and assiduity in this office soon brought him into notice; and not long afterwards, he was appointed by the Government one of a deputation for investigating the resources of that collectorate, in reference to the permanent settlement. His first scheme of authorship was a work on the Agriculture of Bengal; and one of his letters, dated 1790, details the objects of inquiry on that subject to which he had directed his attention. In this work he was assisted by Mr. Anthony Lambert; but the greater portion of it was written by Mr. Colebrooke. The production contained some severe strictures on the commercial policy of the Company; and it was not without considerable hesitation that Mr. Colebrooke consented to its appearance.

It was not till the eleventh year of his residence in India, that he embarked on a course of study which, with the exception of his public duties, engaged the largest share of his attention till his return to England. But the difficulties he encountered in his first attempts

to acquire the Sanscrit language were such, that he had twice abandoned the attempt before he finally succeeded. In 1794, while Collector of the station of Nattore, he undertook the translation, from the original Sanscrit, of a copious Digest of Hindu Law,* which had been compiled under the directions of Sir William Jones. This task cost him two years of unremitted exertion, and fully stamped his reputation as a Sanscrit scholar.

A letter to his father in 1797, discloses the ambition he then had for a seat in the Supreme Council. In opening his views on this subject, he modestly remarks, that he must betray some self-conceit, which he would not exhibit to any one but his indulgent parent, who, he says, will have learned from the occasional thanks bestowed upon him in the progress of his official duties, and from other channels, that he stood high in esteem both with the members of the Government and with the public at large. However, after his appointment, in 1801, to the office of Chief Judge of the High Court of Appeal at Calcutta, he no longer manifested the same eagerness to rise to the higher post; and even declared himself satisfied with the situation he then held, and which, being of a judicial nature, furnished employment of all others the most congenial to his tastes and pursuits. He had studied Civil and Hindu Law throughout his whole life; and as his judicial duties recurred at stated times and for specific periods, his leisure could be more regularly devoted to Literature and Science than while holding the office of Collector of revenue. Towards the close of 1805, he was elevated to the situation to which he had looked during the past ten years with alternate hope and indifference; holding at the same time his office as Chief Judge of the SudderDewanny. Agreeably to the rules of the Service, he vacated his seat at the Supreme Council at the end of five years.

In 1798, he was nominated by the Government to proceed on an embassy to Nagpoor, where he remained about two years; during which time he lost no opportunity of pursuing a varied and extensive course of study in Oriental Literature and the Natural Sciences. He had already contributed many papers on these subjects to the *Asiatic Researches*. The religious ceremonies of the Hindus had especially attracted his attention.

On the establishment of the College for the education of the Civil

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* Recently re-printed in Madras.

Servants at Calcutta, Mr. Colebrooke received the appointment of Sanscrit Professor. The office was honorary in its nature; nor did he deliver any oral instruction; but the circumstance of his connexion with the College led to the compilation of his Sanscrit Grammar. The first volume of this work was published in 1805; but in consequence of the appearance of two other Grammars of the same language, one by Dr. Carey, and another by Dr. Wilkins, the further prosecution of the work was abandoned.

In 1810, he published his translations of the two celebrated treatises on the Hindu Law of Inheritance—a work which he himself valued as much as (if not more than) any other of his literary labours of a legal nature, but which, it appears, was never in much request by the public: a circumstance at which he expressed some surprise.*

During the last few years of his residence in India, he was much interested in the inquiries which the doubtful question of the height of the Himalaya mountains had given rise to. The subject had, indeed, engaged his attention for some time; and the body of evidence by which he sought to determine the problem was the accumulation of twenty years. He had always considered that the height of these mountains had been greatly underrated. Subsequent surveys and admeasurements confirmed his assumptions, and demonstrated that one of the high peaks seen from the plains of Goruckpoor was of the amazing height of 27,550 feet. Mr. Colebrooke took a very lively interest in the progress of these investigations; and the final establishment of the fame of the Himalayas was to him a continued source of satisfaction and delight.

In 1810, he married Miss Elizabeth Wilkinson. Their union, however, was of short duration. The loss of one of their children, and the constant anxiety Mrs. Colebrooke suffered during its long illness, injured her health, and occasioned a predisposition to fever, which eventually carried her off. This severe blow, which marred the happiness of his remaining days, fell upon him just at a time when his family were about to proceed to Europe. Mr. Colebrooke arrived in England early in 1815; and went to reside with his mother near Bath; from whence, in the next year, they removed to the neighbourhood of London; and the metropolis became the chief

* The work is in great demand now, and has been re-printed in Madras, also his Miscellaneous Essays.

place of his abode for the rest of his life. He was there better enabled to follow up his literary and scientific pursuits than a residence in India would permit; and he could now enjoy more fully the society of persons of taste congenial to his own. Having become a member of almost every scientific Institution in London, he passed a considerable portion of his hours of relaxation in the society which they afforded. At this period, his mind certainly disposed him far more towards the pursuit of science than it had hitherto done. He wrote more largely upon the Scientific subjects, occasionally giving essays to the transactions of the Scientific Societies, and being a frequent contributor to the *Quarterly Journal of Science.* He became very much attached to Chemical experiments, to which he would turn for relaxation from severer studies. He was one of the founders of the Astronomical Society, in the proceedings of which he took the greatest interest, having from early youth acquired a fondness for Mathematical pursuits. Indeed, he appears to have always held Science in far higher estimation than Eastern literature; and when his son, the writer of the Memoir under our notice, went out to India, his father never expressed a wish that he should devote his time to Oriental studies, any further than they might be connected with his duties as a Member of the Civil Service. It may interest many linguists to know, that he was strongly in favour of the mode of instruction by translations, being that which he had himself adopted. He was ever anxious to see systematic plans of study; and it was his constant practice to task himself to a certain course every day; and the task soon became a pleasure. His memory was so good, that it was irksome to him to take up any literary work a second time. When young, his deeper studies were usually pursued at night. He told his son, that it was no unfrequent occurrence for him to read himself stupid; and that during the last half hour or so of his vigils, his brain would become confused; but on waking in the morning, he usually found the subject of his reading fresh in his mind.

Shortly after his arrival in this country from India, Mr. Colebrooke presented to the East India Company his library of Sanscrit MSS., a collection the growth of many years; and which, it is thought, cost him, from first to last, about £10,000. He said that he felt such a collection ought not to be kept entirely to himself; and he deemed it more likely to be beneficial to Oriental Science, as well more con-

venient to himself, if it could be placed in a library like that of the East India House, where it might be easily accessible.*—*Asiatic Journal.*

Colebrooke died on the 10th March 1836, at York Terrace, Regent's Park, London.—*Men whom India has known.*

* His bust has been placed at the India House, a wood-cut of which forms a frontispiece to the Madras re-print of his "Miscellaneous Essays."

NOTE

ON THE

ORTHOGRAPHY OF SANSCRIT WORDS.

To obviate the necessity of a reference to the first volume of the Asiatic Researches, where the system of orthography which is here followed was first proposed, I subjoin the pronunciation of the letters.

A, E......pronounced as *u* in *sun*, as *i* in *sir*, as *e* in *her*. When final, it has a very obscure sound, like the *e muet* of the French. The Bengalese pronounce this letter as a short *o*.

Á ....as *a* in *call*.

I..........as *i* in *fit*.

I'.........as *i* in *machine*, and as *ee* in *fee*.

U..........as *u* in *pull*.

U'.........as *oo* in *pool*.

Rĭ.. .....nearly as *ri* in *trip*: more exactly as *ri* in *merrily*.

Rī........nearly as *ree* in *tree*.

Lrĭ.......nearly as *lry* in *revelry*. In Bengal this letter expresses both syllables of the word *lily*.

Lrī.......the same prolonged.

E'.........as the first *e* in *there*, and as *ei* in *heir*.

O'.........as *o* in *go*.

Ai.... .....as *i* in *file*. In Bengal it is pronounced like the Greek diphthong in *poimén*, a shepherd.

Au........as *ou* in *thou*.

N & M...represent the nasal semivowel, which is an abbreviation of the nasal consonants at the end of a syllable; sometimes pronounced gutturally, sometimes labially. Its sounds are familiar to the French tongue.

H..........represents the aspirate semivowel, an abbreviation or substitute, at the close of a syllable, for the strong aspirate. It gives intensity to the sound of the preceding vowel. The short vowels *a* and *i*, and sometimes *u*, when final, are scarcely perceptible unless followed by this element.

C..........as *c* in *cause*, and as *k* in *kill* and *ken*. Used before *e* and *i*, it has not the sound of *s* but of *k*.

C'h.........nearly as *ch* in *choler*, *chiromancy*, &c. *Cachexy* perhaps furnishes a better example of this sound.

G..........as *g* in *gain*.

G'h.........nearly as *g-h* in *log-house*.

Ṅ.........as *ng* in *sing*. It has the sound which we also give to nasals preceding guttural letters, as, *ink*, *bank*, &c.

Ch.........as *ch* in *church*.

Ch'h......nearly as *ch-h* in *much harm*, *rich heir*, &c., if no pause be made in pronouncing these words.

J..........as *j* in *joy*.

J'h.......nearly as *dge-h* in *edge-hill*.

Ny......a peculiar nasal, pronounced before vowels nearly as *ni* in *pannier*, or in *onion*. Before a consonant it varies little from the sound of the nasal in *singe*. I therefore write it in such instances with a single N. The conjunct *jny* is pronounced in the eastern provinces as *gy*, or as *g*.

T',T''h, D',D''h...the sounds of these cerebral letters can only be learned by practice; they are often confounded in pronunciation with a harsh *r*, or with an *l*.

N'.........a peculiar nasal sounded high in the roof of the mouth.

T..........as *t* in *tin* and *ten*.

T'h.........nearly as *t-h* in *hit him*, *white hall*, &c.

D.........as *d* in *deal.*

D'h. ......nearly as *d-h* in *red hair.*

N..........as *n* in *noble.*

P..........as *p* in *pen.*

P'h........sometimes pronounced as *ph* in *philanthropy;* more generally as in *shepherd, haphazard,* &c.

B..........as *b* in *bell.*

B'h........as *b-h* in *abhor.*

M.........as *m* in *man.*

Y.........as *y* in *yet;* in the eastern provinces it is pronounced as *j.*

R.........as *r* in *run.*

L..........as *l* in *lull.*

V, W......as *v* in *valve;* sometimes as *w* in *wind.* In the eastern provinces it is confounded with *b.*

Ś.........a peculiar sibillant, differing from our *s* which is dental, as it is sounded higher on the palate. It is sometimes pronounced like *sh.*

Sh..........as *sh* in *ship,* but often pronounced as *c'h,* or rather as the Greek χ.

S...........as *s* in *sin.*

H..........the strong breathing, or aspirate; as *h* in *hair.* The conjunct *hy* is pronounced in the eastern provinces like *hj* confounded by the ear with *sj* or *zj:* I cannot well mark this peculiar sound.

Csh........a compound letter pronounced as *cti* in *fiction;* but by some it is sounded like *ch,* by others like *c'h.*

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CHAPTER I.

ON LOANS.

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* The original work is divided into Books and Chapters, denominated *dwipas* and *ratnas*, islands and gems, in allusion to the title of the book. The chapters (*ratna*) are generally subdivided; sometimes, however, two or more chapters belong to the same subject. I have taken no other freedom with the arrangement than naming these *ratnas* either chapters or sections, according as the subject required. By this alteration, nine *ratnas* of the first book are reduced to six chapters. The four last *ratnas* being chapters, whilst the first five are sections, which I have placed in two chapters.

CHAPTER II.

ON INTEREST.

CHAPTER III.

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BOOK II.

ON DEPOSITS, SALE WITHOUT OWNERSHIP, CONCERNS AMONG PARTNERS, AND SUBTRACTION OF WHAT HAS BEEN GIVEN.

CHAPTER I.

ON DEPOSITS AND OTHER BAILMENTS.

CHAPTER II.

ON SALE WITHOUT OWNERSHIP.

CHAPTER III.

ON CONCERNS AMONG PARTNERS.

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ON SUBTRACTION OF GIFT.

PART I.

CONTRACTS.

PREFACE

OF

THE COMPILER.

(Originally written in Verse.)

HAVING saluted the ruler of gods, the lord of beings, and the king of dangers, lord of divine classes, the daughter of the king of mountains, the venerable sages, and the reverend authors of books, I, JAGANNÁT'HA, son of RUDRA, by command of the protectors of the land, compiled this book,(1)

2. Entitled the sea of controversial waves,(2) perspicuous, diffusive, with its islands and gems, pleasing to the princes and the learned.

3. What is my intellect, compared with the sacred code? A feeble bark on a perilous ocean. The favour of the supreme ruler is my sole refuge in traversing that ocean with this feeble vessel.

4. The learned RÁDHÁCÁNTA, GURUPRESHÁDA of firm and spotless mind, RÁMAMÓHANA, RÁMANID'HI, GHANAŚYÁMA, and

(1) The present work was compiled at the suggestion and under the superintendence, of SIR WILLIAM JONES. The author, JAGANNÁT'HA, an eminent pandit, was living in the year 1815, at the advanced age of one hundred and eight years; and resident at *Tirveny*, about thirty miles from Calcutta; where, according to Mr. HARRINGTON, surrounded by four generations of his descendants in number nearly an hundred, he gave daily lectures to his pupils upon the principles of law and philosophy. Analysis of the Bengal Regulations, vol. I, page 197, Note. Second Edition.—EDITOR.

(2) This is the signification, in Sanskrit, of *Viváda—bhangárnava;* the title given to the work by the compiler.—EDITOR.

GANGÁDHARA, a league of assiduous pupils, must effect the completion of this work, which shall gratify the minds of princes: of this I have unquestioned certainty.

5. Embarking on ships, often do men undaunted traverse the perilous deep, aided by long cables, and impelled by propitious gales.

6. Ḥaving viewed the title of Loans and the rest, as promulged [promulgated] by wise legislators in codes of law, and as expounded by former intelligent authors,

7. And having meditated their obscure passages, with the lessons of venerable teachers, the whole is now delivered by me.

BOOK I.

ON LOANS AND PAYMENT.

CHAP. I.

ON LOANS.

SECT. I.—*On Loans in General.*(3)

1.

NÁREDA :—What may, or may not, be lent; by whom, to whom, and in what form; with the rules for delivery and receipt, are held *comprised under the title of* Loans delivered (*rĭnádána.*)

"By whom," as a creditor, a loan may be delivered or advanced; namely, by a mercantile man, and the like. "To whom," as a debtor; meaning, to other persons than women, and the rest. "In what form;" with a pledge previously taken, and so forth. "What may be lent;" the

(3) According to MANU, the highest law authority among the Hindus, the subject—matters of legal proceedings, *(vya vahdra-vishaya)*, are comprehended under eighteen heads, "which," he observes, "are settled as the ground-work of all judicial procedure in this world." Vide *Institute*, Ch. VIII, v. 4—7; and also *infra*, Book II, Ch. I, v. 2. The titles of these subjects are specified below :—

1. *Rinádána*, Contraction of debt. 2, *Nikshépa*, Deposit, pledge; especially one which is open, or which if sealed, is specified as to its contents, in opposition to the *Upanidhi*, or sealed or unknown deposit. 3, *Asvámivikraya*, Sale without ownership. 4, *Sambhúya samutthána*, Joint performance of work, or concerns among partners. 5, *Dattápradánika*, Resumption or retraction of gifts. 6, *Vetanádana*, Non-payment of wages or hire. 7, *Samvid vyatikrama*, Non-performance of agreement, breach of contract. 8, *Krayavikrayánusaya*, Rescission of sale and purchase. 9, *Svamipálayor viváda*, Disputes between master and servant. 10, *Simá viváda*, Boundary disputes. 11, *Vákpárushya*, Defamation, slander. 12, *Dandapárushya*, Personal injury; assault and battery. 13, *Steya*, Theft. 14, *Sáhasa*, Violent seizure of property; robbery. 15, *Strisangraha*, Adultery. 16, *Stripumdharma*, Duties of man and wife. 17, *Dáyabhága*, Partition of inheritance. 18, *Dyúta*, Gambling; playing with animate or inanimate materials.

It may be observed in this place, that the above titles are sometimes differently classified and arranged; and in addition to them, a few more topics are introduced,—as, *Vyavahára Mátrika*, Legal procedure in general; *Sákshya*, Oral evidence, *Lekhya*, Written testimony; *Divya*, Ordeal; various kinds of which are described in the Hindu Law; *Abhyupetya susrúshá*, Contracted service; *Prakírnaka*, Miscellaneous matters and forensic duties; &c. All these subjects are again sub-divided and greatly multiplied by diversity of claims; as NÁREDA, cited by VIJNYÁNÉSVARA, has observed; "of these also the distinctions are a hundred and eight fold. From the diversity of men's claims, there are a hundred ramifications."—*Mitákshará*. Ch. 1, Sect. 2, § 6.

In the present work, JAGANNÁT'HA treats only of the Law of Contracts and Succession; omitting altogether the Law of Evidence, the rules of Pleading, the Rights of landlord and tenant, and other topics which might have been advantageously inserted; and which would have rendered the compilation more generally useful in those Courts, in which the Hindu Law is administered.—EDITOR.

excess above that which ought to be appropriated to the support of the family, and the like. All that *is comprised under the title of loans delivered.*

Again : "By whom," as a creditor, *a loan* ought not to be delivered or advanced; namely, by a priest, or the like, not subsisting by his own *regular* livelihood. "To whom," as debtors; to women and the rest. "In what form ;" meaning clandestinely. "What may not be lent ;" that which only suffices for the support of the family, and the like. All that *is comprised under the same title.*

Again : "By whom" a debt should be delivered or paid ; namely, by the debtor. "To whom ;" to the creditor *himself,* not through his wife, or the like. "In what form ;" with a writing previously executed, and so forth. "What should be paid ;" a debt contracted by *the party* himself, and the like. All that *is comprised under the present title.*

Again : "By whom" a debt need not be paid ; by the great-grandson of the debtor, or his remoter descendant. "To whom" *it should not be paid ;* to the wife of the creditor, and the like. "In what form ;" clandestinely. "What" *should not be paid away ;* the exclusive property of the wife, and so forth. All that *is comprised under the present title.*

"The rules for delivery" *by the creditor ;* the rules for advancing a loan on interest ; namely, what sort of interest may be taken without a breach of duty on the part of the creditor. "And *the rules* for receipt ;" the rules for receipt by the creditor at the period of liquidation : those *rules* are the modes of recovery consonant to moral duty, and the rest. "The rules for delivery" by the debtor ; the rules to be propounded for the discharge of debts, such as payment on demand, or the like. "The rules for receipt ;" the delivery of stipulated interest, and so forth. All these titles of forensick contest are comprised under the title of Loans and Payment : the particulars will be delivered under their respective heads ; a little has been mentioned cursorily in this place, to explain the import of the text.

On the reading preferred by BHAVADÉVA and others, *yat' há bhávét* instead of *yat' háchayat, the sense is similar :* the loan, which may be advanced, is comprehended under the title of Loan and Payment ; this forms one member of the sentence. So such loans as may not be made, and so forth, *are also comprised under the same title :* and the terms "loan" and "debt" may be understood in the secondary sense *of a loan not actually advanced, or a debt not actually contracted.*

According to the *Mítácshará,* the title of Loan and Payment is seven-fold ; five-fold in respect of the debtor, and two-fold in respect of the creditor ; namely, *in respect of the last,* the rule for delivery, and the rule for receipt. This will be subsequently explained.*

But the etymology of the term *r̃ìnádána* is this : "the complete delivery (*ádána*) of a loan or debt (*r̃ìna,*) by whom, where, and to whom *made :*" an apposition in the form called *bahubríhi.*(4) By the term "complete deli-

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* See Chap. 5, on Payment of Debts.

(4) *Bahubríhi* or *bahuvríhi,* is one of the forms of grammatical composition ; it is the compounding two or more words to furnish an epithet or attributive : as *bahumála,* having many necklaces, from *bahu* many, and *Mála* a necklace : *pitámbara,* dressed in yellow clothes : and appellative of KRISHNA or VISHNU in that form.—EDITOR.

very," *both* the advance and re-payment are expressed. But, if the thing lent be understood, according to the rule, that "neuter derivatives from active words are similar to nouns denoting substance," the word *rinádána* only signifies "a loan or debt (*rina*) completely delivered (*àdíyamána*);" being derived in the form of apposition called *carmad'háraya*. Yet it may be also understood in the sense resulting from apposition in the form called *bahubríhi*, "the complete delivery of a loan or debt, by whom, or in what place made." The application of several senses to a wordly phrase, through the ambiguity of terms, is unexceptionable: it is accordingly said, that, "in wordly matters, there is no objection to distinguish a phrase according to the distinction of inferrible meaning:" and these, though words of a holy Sage, are secular; for they are unconnected with the *Véda*.

In the expression "the loan ought not to be delivered or advanced," the word "loan" bears a secondary sense; for it is connected with the secondary notion of the request *without the actual advance of the loan*, and so forth; and it does not denote what will be mentioned as the defined sense of *loan* or *debt*.

Other lawyers explain the title, "receipt (*ádána*) of a loan (*rina*,) by what mode *obtained*;" another apposition in the form called *bahubríhi*: and the third or casual case is used adjectively; thus the essential properties with which the receipt of a loan is connected, are severally titles of Loans received. Those essential properties are, the creditorship of *Vaisya*, or the like; the debtorship of others than women, or the like; feneration at the rate of an eightieth part *by the month*, and so forth: NÁREDA also specifies, as comprehended under the title of Loans, the place where, *or person to whom*, the loan is made (I.)

It is said, "may, or may not, be lent;" but what is a loan? The Sage replies to that question:

2.

NÁREDA:—That contract of delivery and receipt which is made with a view to a gain *by the lender* on the principal sum while remaining *with the debtor*, is called a loan on interest (*cusída*;) and money-lenders acquire their subsistence by it.

"The principal sum," literally its continuance: the contract of delivery and receipt is made with a view to gain or increase, so long only as the principal remains *with the debtor*. These two, *the words* "*delivery*" *and* "*receipt*," are in the passive form. The loan is delivered by the creditor with a view to a gain on a durable capital, and is received by the debtor with a stipulation to that effect. When it bears no interest, then the term "loan" is employed in a secondary sense; *for* a subsistence is not thereby gained.

A secondary notion, or quality, is stated, in the fourth lecture of the *Nyáya*,*(5) to be that which is necessary to the existence affirmed.† That

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* Treatise of GÓTAMA, on Dialectick Philosophy.

† Essential not adventitious, to the subject.

(5) In Eastern India, the *Védas* and *Mímánsás* (the latter described as "properly the logic

which is given, is received back; or something of the same kind *in its stead*: hence, what is advanced for the purposes of traffick, is not a loan.

VÁCHESPATI MISRA.

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of the law"), are less studied than in the South; and the Lawyers of Bengal and Behar adopt very generally the *Nyáya* or dialectic philosophy, for rules of reasoning and interpretation upon questions of Law. Hence arose two principal sects or schools, which construing the same text variously, deduce upon some important points of law different inferences from the same *Dicta* or maxims. COLEBROOKE, in STRANGE's *Hindu Law*, vol. I, page 316.—Third Edition. Instances of the application of reasoning, as taught in the *Mimánsá*, to the discussion and determination of juridical questions, may be met with in several Hindu Law works. See for instance, *Mitákshará*, on Inheritance, ch. I, sect. 1, § 10, and I, 9, § 11, and II, 1, § 34: JÍMÚTA VÁHANA, ch. X, sect. 5, § 16—19. *Dattaka Mimánsá*, on adoption, ch. I, sect. I, § 35—41; and IV, 4, § 65—66, and VI, 6, 27—31. *Dattaka Chandrika*, ch. I, sect. 1, § 24, and II, 2, § 4.

The *Nyáya*, alluded to in the text, of which GÓTAMA or GAUTAMA is the acknowledged author, furnishes a philosophical arrangement with strict rules of reasoning not inaptly compared to the dialectics of the ARISTOTLIAN school. COLEBROOKE, *Philosophy of the Hindus*, Essays, vol. I, page 227.

As frequent allusion will be made in the course of the work, to the schools of Hindu Law, it would not be out of place, it is thought, to insert here a brief account of each of them, of the extent and situation of the districts where the doctrines of the several schools are current, and also of such works as are usually referred to, as final authorities, by the followers of the respective doctrines, excluding the text-books and mere explanatory comments.

In the present day, five schools of Law may be said to exist in India. They may be classed in the following order;—*Gauriya* or Bengal; *Mit'hila* or North Behar; *Benáres*; *Maháráshtra* or the *Mahrátta* country; and *Drávida*, or the south of the peninsula.

I. The *Gauriya*, or Bengal school prevails over the whole province of Bengal proper and apparently is co-extensive with the Béngáli language, or, at least, is of authority wherever the Béngáli is spoken by the inhabitants of the country. This school stands nearly alone, particularly with regard to the Law of Inheritance, in which there is a wide difference in doctrine between the northern and the other schools, the latter receiving some treatises in common, which are totally rejected by the *Gauriya* lawyers.

The principal Law works, recognized by this school are the following:—

Dharma Ratna by JÍMÚTA VÁHANA. *Dáya Bhága*, and its commentaries by SRÍKRISHNA TARKÁLANKÁRA, and SRÍNATHA ACHÁRIYA CHÚDAMANI. *Dáya Krama Sangraha* by SRÍKRISHNA TARKÁLANKÁRA. *Smriti Tatwa* and *Dáya Tatwa*, by RAGHUNANDANA. *Vivádárnava Sétu*. *Viváda Sárárnava*. *Viváda Bhangárnava*, the present compilation.

II. The *Mit'hila* school is that of North Behar, the ancient kingdom of *Mit'hila* or *Tirabhukti*, corrupted into Tirhut; which, though not often mentioned in history, is famous for having been the residence of SÍTA, RÁMÁ's wife. This school assimilates in a great many points with that of Bengal; inheritance, however, being still excepted.

The subjoined anthorities are followed by the *Mit'hila* school:—

Mitákshará by VIJNYÁNÉSVARA. *Viváda Ratnákara*. *Viváda Chintámani*, and *Vyavahára Chintámani*, both by VÁCHESPATI MISRA. *Dvaita Parisishta*, by KÉSAVA MISRA. *Viváda Chandra*, by a female LACHMIDEVI. *Smrita Sára*, by STRÍDHARÁCHARYA. *Samuchchaya Madana Párijáta*, by VISVESVARA BHATTA.

III. The doctrine of the *Benáres* school is followed in the city and province of that name, and is the prevailing school of middle India. The doctrine of this school is current in Orissa, and extends from Midnápur to the mouth of the Hooghly, and thence to Chicacole.

The following works are held in repute by the Lawyers of the *Benáres* school:—

Mitákshara. *Viramitródaya*, by MITRA MISRA. *Parásara Mádhaviya*. *Viváda Tándava* and *Nirnaya Sindhu*, both by KAMALÁKARA.

IV. The *Maharáshtra* school governs the law in the country of the Mahráttas.

"The south limit of the Mahrátta country," observes Mr. MORLEY, "may be loosely stated as passing from Goa through Kolapur and Bidr to Chandra; the eastern line follows the Warda river to the Injádri or Satpúrá hills, south of the Nerbudda, and which form its northern limit as far west as Nandód: and the western boundary may be marked by a line drawn from Nandód to Damán and thence following the sea coast as far as Goa: in other words the Maharáshtra school prevails wherever the Mahrátta language is spoken by the natives."

"The principal sum;" the continuance of the money lent. "A gain;" the acquisition of money, or the like. The very loan which is advanced by the owner or *creditor* with a view to that, is received by the user or *debtor*.

The *Retnácara*.

Consequently, that property which affords a gain stipulated in consideration of its remaining *for a time* with the debtor, is a loan; or, that which produces a gain by being advanced to remain with the debtor, is a loan.

The works of paramount authority in this school are the subjoined:—

Mitákshará. *Vyavahára Máyukha*, by NÍLAKANTHA. *Nirnaya Sindhu*. *Hémadri* by HEMADRI BHATTA KASIKAR. *Smriti Kustubha*. *Mádhaviya*.

V. The *Drávida* school extends over the whole of the southern portion of the peninsula of India; in it is included the territories dependant on the Government of Madras.

This school may be sub-divided into three districts, in each of which some particular law treatises have more weight than others: these districts are *Drávida* properly so called, *Karnátaká*, and *Andhra*; and their territorial distinction is given by Mr. MORLEY, as follows:

"Drávida Proper is the country where the Tamil language is spoken, and occupies the extreme south of the peninsula: its boundaries may be traced by a line drawn from Pulicat to the ghâts between Pulicat and Bangalur, and then following the ghâts westward, and along the boundary between Malabar and Kanara to the sea, including Malabar.

"The Karnátaká country is bounded on the west by the sea-coast as far as Goa, thence by the western ghâts up to Kolapur, to the north by a line drawn from Kolapur to Bidr, and on the east by a line from Bidr through Adóni, Anandpur, and Nandidrúg to the ghâts between Pulicat and Bangalur: this is the country where the Karnátaká language is now spoken.

"The third district, the Andra, where the Telinga or Telugu is now the spoken language, extends from the boundary line last mentioned, and which, prolonged to Chandra, will form its western limit; on the north it is bounded indistinctly by a line running eastwards to Sohnpur on the Mahanaddí river; and on the east by a line drawn from Sohnpur to Chicacole, and thence to Pulicat, where the Tamil country begins. Mr. Ellis imagines that there are laws existing in the southern provinces which are of higher antiquity than those introduced from the north, although not all derived from the same source. ("On the Law Books of the Hindus," in the Transaction of the Literary Society of Madras. Pt. I, p. 17.) This supposition is favoured by the fact, that Professor Wilson thinks it probable that the civilization of the south of India may date as far back as ten centuries before Christ."

The subjoined is a list of the works held as authorities in the several divisions of the *Drávida* school:—

(a) Drávida division:—*Mitákshará*. *Mádhavyá*. *Sarasvati Vilása*. *Varadaráјiya* by VARADARÁJA.

(b) Karnátaká division:—*Mitákshará*. *Mádhavyá*. *Sarasvati Vilása*.

(c) Andhrá division:—*Mitákshará*. *Mádhavyá*. *Smriti Chandrika*, by DÉVANDA BHATTA. *Sarasvati Vilása*.

It may be as well to state here, that in questions relating to adoption, the *Dattaka Mímánsá* by NANDA PANDITA is preferred in Bengal and in the south; while the *Dattaka Chandrika* by DÉVANDA BHATTA is held in repute in *Mit'hila* and *Benáres*.

The above particulars give the limits of the various schools of Law, so far as they can be approximately defined. It will be observed from the foregoing list of law works that in all the western and southern schools, the prevailing authority is the nearly-universal *Mitákshará*, and although the Mahráttas may prefer the *Mayukha* to the *Mádhavyá* and the contrary may be the case in the *Karnátaká* country, whilst in other districts other treatises are referred to, still the law itself, even in regard to Inheritance, is essentially the same throughout India. In the province of Malabar, however, a different rule of Succession prevails, from what exists in the other districts of the Madras Presidency. This peculiar Law of descent will be noticed in its proper place.

In compiling the above abstract of the various Law schools and authorities, I have made free use of the valuable and interesting materials contained in the Introduction to Mr. MORLEY'S "Analytical Digest," Vol. I, Old Series. I have also consulted with advantage, the "Principles and Precedents of Hindu Law," by Mr. W. H. MACNAGHTEN. In the Preface to the present work a list of the principal Hindu Law Authorities will be found.—EDITOR.

Such is the definition of *loan.* A full account of this will be delivered in another work.

When interest is not borne, the word "loan," or debt, is employed only in a secondary sense; for money-lenders do not acquire their subsistence by loans without interest: and it is employed in a general and secondary sense in the phrase "a loan shall be given;" and in this, "he who takes the assets, shall be compelled to pay the debts;" and in other instances. 'What is necessary to the existence affirmed,' refers to the agreement that "the debt shall positively be re-paid:" and this extends to other things, as *payment* on demand, and the like. Such is MISRA's opinion.

But we maintain this definition: money advanced with a view to the future *revived* property of the creditor, and to his gain by means of interest or the like, is a loan; for, even without interest, there may be friendship gained, or the like. The term is not employed in a secondary sense: friendship, and the like, are comprehended in the phrase "the acquisition of money, or the like."

"The continuance *of the principal sum;*" its remaining with the debtor, its being unrepaid, and so forth. 'So long only as the principal remains;' since the term "only" excludes any other supposition, interest is not obtained if the principal sum be wanting. But, as for what is advanced for the purposes of traffic, there is not any non-repayment; for the exact meaning of non-repayment is, that, after the creditor's property has ceased *by the act of delivering the thing lent,* neither the thing *itself,* which had been his property, is *ultimately* restored, nor an equivalent *immediately* given. Or else, the advance of the principal may be signified by the expression, "so long only as the principal remains; for it shows an inseparable relation.*(6) In traffic, and the like, the employment of a man's own property with a view to gain is acknowledged; not the employment of another's property. According to MISRA, gain consists in the excess above the principal held as a man's own property.

But we explain "the principal sum," its continuance, *while it is* held as property by the creditor *in reversion,* and by the debtor *in possession.* "With a view to a gain; under the term "gain" are comprehended the interest received by the creditor, friendship *gratified,* duty fulfilled, or the like; it also comprehends the debtor's enjoyment of the thing lent, and the

* In Logick, *anwaya* and *vyatiréca;* the first is the relation of events, of which, whenever one occurs, the other also occurs; the second is the connection of circumstances, of which, when one occurs not, the other also does not occur.

(6) The following passage will serve as an illustration of this form of argumentation. It is extracted from the *Mitákshará* of VIJNYÁNÉSVARA, ch. II, sec. 8, § 15.

"But [should it be objected], that "In a denial of more than one written claim," &c. is one sacred text, and "In an action comprising many claims," &c. is another sacred text; that here no authority can attach to either, from their opposition to each other, and their being mutually conflicting; and that they cannot be reconciled by applying them to different subjects;—it is answered, that "when two sacred texts oppose each other, that which is most applicable has most weight." *(a)* Where two sacred texts contradict each other, the contradiction must be rejected by referring them severally; and that which is applicable, by general or particular inference or otherwise, has most weight or authority. Should it be asked how this applicability is to be made apparent; it is answered, by experience, by ancient experience, showing the relation between cause and effect."

(a) A text of YÁJNYAWALKYA, quoted by SÚLAPÁNI, BÁLAMBHATTA, &c.—EDITOR.

like. Hence the exposition of the *Retnácara*, "the acquisition of money, or the like:" is it not there said, "received by the debtor," but "received by the user;" nor is it clearly shown, that the expression, "with a view to gain, so long only as the principal remains *with the debtor*," is that form of speech which is named *Saptimí tat purusha.** It appears, therefore, that a loan or debt is money connected with a gain *allowed* in consideration of the creditor's property in it; on the notion, that, because the money was the property of that man, therefore the gain is his. Or it may be "money connected with a gain *allowed* in consideration of the debtor's *temporary* property in it." Or, if the apposition be thus explained, "with a view to the permanence *of the capital* and to a gain," the permanence of the capital denotes the future revived property of the creditor, and gain signifies interest *received*, duty *fulfilled*, or the like. Consequently, the word "loan" is not employed in a secondary sense, even where no interest is borne; for the phrase, "money-lenders acquire their subsistence by it," relates solely to loans bearing interest; and the transactions of commerce, and the like, connect a price with the thing, and a commodity with the purchase: it is not customary in *traffick* to make a distinction, "this is the principal sum, this the increase:"(7) therefore a capital so employed is not a loan.

It should be here noticed, that, in the first place, the borrower asks for money; next, the lender gives the money, saying or thinking, "so much interest must be paid, and the principal sum be repaid:" property is thereby vested in the user or debtor; for the verb "give:" signifies an act vesting property in another, after annulling the agent's own property. Hence, if the debtor happen to lose that money, the loss does not fall on the creditor; and, *from the same cause*, the debtor may at pleasure dispose of what he has borrowed. Afterwards, since, by reason of the agreement made, the amount of the principal sum must be repaid with interest, or an equivalent be given, the creditor's property is *revived* by payment made by the debtor; or if he refuse to pay it, the debtor commits a sin, and is liable to punishment. Creditorship and debtorship are distinguished by some peculiarities; the definitions are not therefore identical;† it is the same in speaking of undivided brethren, and the like.‡ The delivery of a loan or debt (*rĭnádána)* is a phrase, not a *compound* word. To enlarge would be snperfluous.

Is not loan on interest (*cusída*), instead of loan *generally* (*rĭna*); explained by such a definition? This question is answered by the following text.

3.

VRĬHASPATI:—That loan (*rĭna),* which, increased to four times or eight times the principal, is *thus* received back, without apprehen-

* Apposition of terms, where the last is chiefly considered, and which is resolvable into the seventh case. The compound *st'hána lábha* has been thus resolved into *st'háné satyéva lábha*, gain, only if the capital remain.

(7) The Latin word, *fenus* or *fœnus* has a signification similar to *vriddi* the *Sanskrit* for interest. It originally meant any "increase," and was thence applied to denote the interest or increase of money. "*Fenus*," says VARRO (*apud* AULUM GELLIUM, *Noctes Att*: XVI, 12), "*dictum a fetu et quasi a fetura quadam pecuniæ parientis atque increscentis.*" The word *fecundus* is evidently derived from the same root.—EDITOR.

† *'Atmásraya;* identical. Such definitions are faulty; as A son of B, and B father of A.

‡ Apparently liable to a similar objection, that they can only be thus explained: undivided brethren are those who have not made a partition; and divided brethren are those who do not remain in co-parcenary.

sion of sin, from an abject or distressed person (*cutsita* and *sída*), is called a loan on interest (*cusída*).

"From an abject or distressed *debtor*;" from a debtor who is an outcaste or otherwise abject, or who is indigent or otherwise distressed What is received back with interest from such a debtor without apprehension of sin; without fear of any consequent sin (for such receipt is no acceptance of gift *from an unworthy person*). Hence a loan (*rina*) is called a loan on interest (*cusída*).

In this instance there is only the sin of distressing a miserable person; but there is none if his misery were merely pretended: and even if he were really distressed, the creditor may confer a benefit by prolonging the term of the loan, or otherwise; and such is the practice.

Should the principal sum only be received back, or should it be received with interest? On this point the Sage says, "increased to four times or eight times the principal." The word "or" is indefinite; it also suggests a debt doubled, or the like. Hence it has been already said, "what is received back with interest." Loans quadrupled, and the like, will be explained under the head of Limits of Interest.

Since the words *rina* and *cusída* are used synonymously, the definition of *cusída* is also the definition of *rina*: and that is made evident by NÁREDA (1 & 2). The other text (3) only shows the verbal derivation of the word *cusída*. This exposition conforms with the opinion delivered in the *Retnácara*. The definition of the word *rina*, which occurs in the first text (1), is well delivered by a text of NÁREDA (2), although the term be changed in that text. But the word *cusída* is formed adverbially (*from the particle* cu *and noun* sída).

By whom a loan should be advanced. NÁREDA declares in the concluding part of the text quoted (2); money-lenders acquire their subsistence by it. The casual has the sense of identity; "even that is their livelihood." Or the word subsistence (*vritti*) in a neuter sense, may signify *their mode of* existence. Money-lenders are men of the mercantile class; accordingly YÁJNYAWALCYA, in the chapter on Modes of Subsistence, says,

4.

YÁJNYAWALCYA:—Money-lending agriculture, traffick, and attendance on cattle, are declared to be *the proper subsistence* of the mercantile class.

"Money-lending;" placing money at interest. "Traffick;" living on the profits of purchases made at a fair price.

The *Dípacalicá.*

5.

MENU:—The king should order each man of the mercantile class to practise trade, or money-lending, or agriculture and attendance on cattle; and each man of the servile class to act in the service of the twice-born.(8)

(8) Though the words *játi* and *varna* are nearly synonymous, still, the Hindu Lawyers observe a distinction between the two; applying the former term to denote the mixed, and the latter, the unmixed classes.—EDITOR.

The king should compel a man of the mercantile class to practise trade, money-lending, agriculture, or attendance on cattle ; and a man of the servile class to act in the service of the twice-born. If they refuse to do so, they should be amerced by the king : on that account only it is mentioned in this place (*in the eighth chapter, on Judicature ; and on Law, private and criminal.*) CULLÚCABHATTA.

The meaning is, that the expression "the king should compel them to practise, &c." implies, that they should be amerced if they refuse to do so. But if a *Vaisya* do not practise money-lending through apprehensions *entertained by him* that the loans will not be subsequently repaid, he should not be fined. Since it is declared by MENU, that an *'Ambasht'ha*(9) should live by curing disorders ;* *but since men of mingled births may follow the occupation of their mother's class*, an *'Ambasht'ha*, adopting the profession of the mercantile class, should not be fined if he do not practise money-lending. To enlarge on the subject of fines, which have been incidentally mentioned, would be superfluous.

For the sake of conferring benefits and the like, any proprietor of wealth may lend money without intending to obtain interest for that is not prohibited. By those who may practise money-lending, a small part only of their wealth ought to be lent: this being incidentally mentioned, BHAVADÉVA cites the *Márcandéya purăna*, on the subject of what may not be lent.

6.

Márcandéya Purána :(10)—A prudent man should set apart a fourth of his property for *pious uses with a view to* another world ; and apply half to his own subsistence, and to constant and occasional rites ;

2. He should augment the *remaining* fourth of his property, or half of half, making it his capital ; the wealth of him, who acts thus, becomes productive.

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(9) *'Ambasht'ha*, called also *Vaidya*, is one born of a *Vaisya* woman, by a man of the sacerdotal class : his profession is the science of medicine. Vide MENU, ch. X, v. 47 *et seq*, for a long list of the mixed tribes, and of the professions they are respectively enjoined to follow.—EDITOR.

* Chap. 10, v. 47.

(10) One of the sacred and poetical works among the Hindus. There are eighteen acknowledged *Puránas* : these are supposed to have been compiled or composed by the poet VYÁSA, who also arranged the *Védas*—hence called VÉDA-VYÁSA ; and they comprise the whole body of Hindu theology. Each *Purána* should treat of five topics, especially the creation, the destruction and renovation of worlds ; the genealogy of gods and heroes ; chronology, treating of the reigns of the *Menus* ; and heroic history, containing the achievements of demigods and heroes. They may thus not be inaptly compared to the Theogonies of the ancient Greeks. The names of the eighteen *Puránas*, are as follows. 1, BRAMHA. 2, *Padma*, or the lotus. 3, *Bramhánda*, or the egg of BRAMHA. 4, *Agneya* or *Agni* fire. 5, VAISHNAVA or of VISHNU. 6, *Garuda* or of the eagle. 7, *Bramhavaivarta*, or transformation of BRAMHA, that is of *Krishna*, identified with the Supreme Being. 8, *Saiva*, or of SIVA. 9, *Linga*. 10, *Narédeya* or of NÁREDA. 11, SKANDA. 12, MÁRKANDÉYA, so called from a *Muni* or sage of that name. 13, *Bhavishyat*, or prophetic. 14, *Matsya*, or the fish. 15, *Varaha*, or boar. 16, *Kaurma* or of the *Kurma* or tortoise. 17, *Vamana*, or dwarf, and 18, *Bhagavat* or life of KRISHNA. Besides these there are eighteen other works of subordinate value called *Upapuranas*, the composition of which is attributed to various sages.

It will be seen from the above and other citations in the present work, that JAGANNÁT'HA does not confine himself in the selection of his authorities to strictly legal Treatises, but makes free use of passages in illustration of his views, derived from all sources, mythological as well as dramatical.—EDITOR.

The meaning is, that the whole property should not be lent: and if the estate be small, and the family be barely maintained from it, in that case no loan should be made. Such is the ascertained sense of the text. But if the means of subsistence cannot be provided by the pursuit of their own profession, even priests may place money at interest: this VRĬHASPATI, quoted by BHAVADÉVA, declares.

7.

VRĬHASPATI:—A twice-born man may practise money-lending, agriculture or trade, not conducted in person; and even practising them in person, during seasons of extreme distress, he is not tainted with sin.(11)

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(11) Originally there were but four castes; viz., the *Bráhmana*, the *Kshatriya*, *the Vaisya*, and the *Súdra*. From these has sprung up a multitude of mixed castes, who at the present date maintain their division with great strictness, and abide by certain laws and regulations framed for their social and religious guidance. In the *Játimála*, or Garland of Classes,—the origin of the four principal castes is given as follows:

"In the first creation, by BRAHMÁ, *Bráhmanas* proceeded, with the *Véda*, from the mouth of BRAHMÁ. From his arms *Kshatriyas* sprung; so from his thigh, *Vaisyas:* from his foot *Súdras* were produced: all with their females."

As regards the regular means of subsistence for the above castes,—those for a *Bráhmana* are assisting to sacrifice, teaching the *Védas*, and receiving gifts; for a *Kshatriya*, bearing arms; for a *Vaisya*, merchandize, attending on cattle, and agriculture; for a *Súdra*, servile attendance on the higher classes. The most commendable acts are, respectively for the four classes, teaching the *Véda*, defending the people, commerce, or keeping herds or flocks, and servile attendance on learned and virtuous priests.

A *Bráhmana*, unable to subsist by his own duties, may live by those of a soldier: if he cannot get a subsistence by either of these employments, he may apply to tillage, and attendance on cattle, or gain a competence by traffic, avoiding certain commodities.

A *Kshatriya*, in distress, may subsist by all these means; but he must not have recourse to the highest functions. In seasons of distress, a further latitude is given. The practise of medicine, and other learned professions, painting and other arts, work for wages, menial service, arms, and usury, are among the modes of subsistence allowed to the *Bráhmana* and *Kshatriya*.

A *Vaisya*, unable to subsist by his own duties, may descend to the servile acts of *Súdra*.

A *Súdra*, not finding employment by waiting on men of the higher classes, may subsist by handicrafts; principally following those mechanical occupations, as joinery and masonry; and practical arts, as painting and writing; by following of which he may serve men of superior classes: and, although a man of lower tribe is in general restricted from the acts of a higher class, the *Súdra* is expressly permitted to become a trader or a husbandman.

Besides the particular occupations assigned to each of the mixed classes, they have the alternative of following that profession which regularly belongs to the class from which they derive their origin on the mother's side: those, at least, have such an option, who are born in the direct order of the tribes, as the *Múrdhábhishicta*, (one born of a *Bráhmana* by a girl of the *Kshatriya* class,) the *'Ambasht'ha*, and others. The mixed classes are also permitted to subsist by any of the duties of a *Súdra;* that is, by a menial service, by handicrafts, by commerce, or by agriculture.

Hence it appears, that almost every occupation, though regularly it be the profession of a particular class, is open to most other tribes; and that the limitations, far from being rigorous, do, in fact, reserve only one peculiar profession,—that of the *Bráhmana*, which consists in teaching the *Véda*, and officiating at religious ceremonies.

Vide COLEBROOKE, Essay VI, "On Enumeration of Indian Classes,"—(Essays, vol. II, pp. 186-187,) from which the preceding particulars are extracted.

The following cases decided by the Court of Sadr-Udalat at Bombay, have reference to some peculiar usages and privileges claimed by the followers of certain professional classes. They are taken from MORLEY's Digest, Article "Caste," cases 16 b, and 21.

A tradesman being accused by two companies (gold-wire drawers and gold-thread makers) of working at their trades conjointly, the companies respectively instituting suits against him to make him relinquish their trades, it was urged, in defence, that he only practised one trade but admitted that the other was carried on in the same house by his brother and a partner.

2. Having received gain, let him honour the progenitors of mankind, the deities and priests; when they are satisfied, no doubt they deprecate that offence committed by him.

The word 'twice-born' concerns a man of the sacerdotal class; for it is said "he is not tainted with sin:" if it concerned a man of the commercial class, it would be superfluous to say, "he is not tainted with sin;" for it is not supposed that a man of the commercial class sins by practising money-lending. Men of the military class may also practise money-lending, in seasons of distress; for MENU says, "but a *Bráhmana* and a *Kshatriya*, obliged to subsist by the acts of a *Vaisya*, &c."* If they can subsist by their regular profession, priests ought not to rely on money-lending for a livelihood, since a text of MENU declares,

But, among those six acts of a *Bráhmana*, (*reading and teaching the* Védas, *sacrificing and assisting to sacrifice, giving and accepting*,) three are his means of subsistence; assisting to sacrifice, teaching the *Védas*,(12) and receiving gifts from a purehanded giver.†

And because MENU reprehends the occupation of a *Vaisya* followed by a *Bráhmana*;

His own office, though defectively performed, is preferable to that of another, though performed completely; for, he who *without necessity* lives by the acts of another class, immediately forfeits his own.

His own office (which should regularly be discharged by him), however defectively it be performed, is preferable to that of another, though fulfilled; because, he who lives by the acts of another class, instantly falls from his own: this inculcates the necessity of avoiding such offences. CULLÚCABHATTA.

The Court held, that the two companies rising against him was corroborative of his not fairly observing the rules of trade; and though it was a common and allowable practice for two brothers, united in interests, to follow two distinct trades; yet as the trades in the present case were closely connected, and the two brothers, by each following one of these trades in the same house, could play into each other's hands, in a manner contrary to the meaning and sprit of the rules of the two *Panchayets*, the Court directed that the two brothers should be confined to one of the trades, so long as they should continue to live in the same house, making their own election.—*Kulyanjee Narayanjee* versus *Huree Bhaee Poonjiya Mookadum* and others.

In a suit by the gold-thread spinners *Panchayet*, at Surat, against a member of their body, for working for a wire-drawer, contrary to a bye-law of the caste; a decree was given in their favor by the Assistant Judge and the Judge, as it was proved that he had signed the agreement; but on appeal it was held that though it was fully proved that he was a party to the engagement, bye-laws and private engagements like the present, tending to the injury of the public, could not lawfully be made the ground of an action; and the decrees of the Lower Courts were reversed, relieving the appellant from the responsibilities incurred, and making the respondent liable for all costs. *Gerdhur Mooljee* versus *Jugjeeven Luxmeechund*, on the part of the *Vitrarah Panchayet*.—EDITOR.

(12) When the study of the Indian sacred writings was more general than at present, learned priests derived titles from the number of *Védas* with which they were conversant. Since every priest was bound to study one *Véda*, no title was derived from the fulfilment of that duty; but a person who had studied two *Védas* was surnamed *Dvivédi;* one who was conversant with three, *Trivédi;* and one versed in four, *Chaturvédi*. The titles abovementioned have become the surnames of families, especially among the *Bráhmanas* of *Kaniyúkubja* or *Kanój*, and are corrupted by vulgar pronunciation into *Dóbé Tiwáré*, and *Chaubé*. It is well known that the Indian scripture is distributed into four parts, severally entitled, *Rig*, *Yaju*, *Sáman* and *Atharvana;* and each of which bears the common denomination of *Véda*.—EDITOR.

* Chap. 10, v. 83. † Chap. 10, v. 75.

Here it should be understood, from the expression "he who lives by the acts of another class," that such a practise, whether in person, or not in person, is reprehended. It is also the opinion of eminent lawyers, that penance must be performed for exceeding the rate of an eightieth part and the like, by taking greater interest in a season when no distress is experienced. It would be vain to discuss further the subject of livelihood.

Money-lending may be also practised by a 'Súdra in times of distress; for YÁJNYAWALCYA authorizing traffick, and the *Nerasinha purána* authorizing agriculture, which, it may be inferred, are accompanied by money-lending, it is a reasonable induction that money-lending is also authorized: and, according to the opinion of VÁCHESPATI MISRA, it appears that a 'Súdra may receive a gain.

YÁJNYAWALCYA:— Śúdra should serve twice-born men; but if he cannot thus subsist, he may become a trader.

The *Nerasinha Purána*:—Unasked he should give *alms to priests*, and rely on agriculture for his subsistence.

By whom a loan may be made, and by whom it may not be made, have been both cursorily explained.

SEC. II.—*On the same, and on the Form of the Contract.*

ART. I.—*On the Impropriety of Lending to certain Persons.*

8.

CÁTYÁYANA:—Let no man lend any thing to women, to slaves,(13) or to children: whatever thing of value has been lent to them, the lender cannot *in general* recover *without the assent of their guardian or master.*

Nothing should be lent to women, because they are unable to repay it; for it is recorded, that they have no property exclusively their own (Book II, Chap. iv, v. 56.) May not their debts be repaid by their husbands? This should not be affirmed, for it is confuted by a text of YÁJNYAWALCYA, which will be quoted. It should be here understood, that a widow has property in the wealth she possesses; but, since she is very helpless, and only supports herself on the abundant wealth *before* acquired by her husband or the like, out of what funds can she repay the loan? From this apprehension, nothing should be lent even to widows. But if there be any certainty of repayment, then a loan may be made; for this text is *only* a rule of Ethics: and since a loan may be subsequently repaid by her son, there is no objection against a loan made to a woman who has a son, whether she be a widow or have a husband living. Nor do we see any objection against loans

(13) The Hindu Lawyers include slaves under the head of "Chattels." Commenting on a passage of YÁJNYAWALCYA, JÍMÚTA VÁHANA and CHÚDÁMANI infer from the association in the text of "Immoveables and bipeds," that the term "Chattel" is intended to signify a biped or slave: "for," says ACHYUTA, "if the term intend substance in general, the mention of land and corrody, and the specific notice of chattels, would be superfluous." Vide *Dáyabhaga* of JÍMÚTA VÁHANA, Ch. II, § 14. By Act No. V of 1843, Slavery has been abolished throughout British India, and slaves are now capable of possessing and exercising the same rights as free-born men. The subject of Slavery will be noticed hereafter, in Book III.—EDITOR.

made to women who have separate property, on the mortgage of their immoveable property. A debt contracted by a woman, whose husband is absent, for her food and apparel, or for the support of her servants, must be repaid by her lord; and debts contracted by the wives of herdsmen and the like, must also be repaid by their husbands: we hold it a rational opinion, that there is no objection against lending money to those women.

Nothing should be lent to slaves, because they also are declared to have no property exclusively their own, by the text above quoted. Here a man's own slave is meant: he should not therefore lend anything to his own slave; for what that slave acquires, belongs to *the master* himself. This rule may be applicable to slaves bought: but why should not loans be made to hired servants, for the loans may be repaid out of their wages? Such a doubt should not be entertained: since a servant only maintains his family with difficulty out of trifling wages, whence can he repay a loan? But there is no objection against loans made to servants hired on great wages; and the practise *of making such loans* subsists amongst excellent persons.

Neither should a man lend anything to the slave of another, because all his property is dependent on his master: if, therefore, a man do lend any thing to the slave of another, it cannot be demanded from his master. But if the slave of any person ask a loan in his master's name, and it be ascertained that he asks it for the support of his master's family, in that case a loan may be made; for it is declared by a text of CÁTYÁYANA, that such a debt must be discharged by his master.

9.

CÁTYÁYANA:—Bhrígu ordained, that a man shall pay a debt contracted in his remote absence, even without his assent, by his servant, his wife, his mother, his pupil, or his son: *provided it were contracted* for the subsistence of the family.(14)

But when a loan is asked by a servant on his own account, whether he belong to the lender or another person, it may be given on the pledge of his wages; this will become evident on the further discussion of the subject: these texts will be explained and discussed in another place; to enlarge would be *now* superfluous.

A youth is a minor to the end of his fifteenth year, as we shall show in the chapter on the Payment of Debts. *Nothing should be lent* "to children;" this intends generally any person incapable of civil acts, and comprehends idiots and the like. If there be guardians of the minors and the rest, namely, their maternal uncles or the like; and these take up a loan from a money-lender, for the benefit of the minor or other ward, executing a deed in the ward's name and their own; in that case the loan may be legally advanced after ascertaining that the guardian does not act fraudulently: although no text occurs *to this purport*, it is proved by the frequent practise of good men. Afterwards, when the minority expires, the creditor may recover the debt from that youth; but, while the minority lasts, he could only recover it from the maternal uncle, or other person entitled to act *as guardian*. This should be observed by the wise.

Reverend persons, as spiritual parents and the like, to whom harsh discourse cannot be addressed, and who cannot be sued in the king's courts of

(14) A text of NÁREDA of a similar import is cited in Book I, ch. V, v. 191.—EDITOR.

justice, may be comprehended under this text, by considering "Children" as an instance adduced of a general meaning. Consequently, to them also nothing should be lent; but a person who possesses wealth must maintain them, else he would fail in his duty.

10.

NÁREDA to INDRA, in the *Herivansa*:—No man, O thou subduer of foes, should have pecuniary dealings with him, from whom he desires much affection, nor visit *his* wife in his absence.

"*His*" must be supplied.—BHAVADÉVA.

"Pecuniary dealings;" the advance or acceptance of a loan; it may also be understood of deposits and the like. The motive *for avoiding such transactions* is the apprehension of forfeiting friendship. But a distinction will be mentioned in another place. It is deduced from the obvious sense of the texts, that a loan may be made to any other person except those to whom it is forbidden to lend anything.

ART. II.—*On the Contract of Loan.*

11.

VRÌHASPATI, quoted by BHAVADÉVA, VÁCHESPATI, and CHANDÉSWARA:—A prudent lender should always deliver the thing lent, on receiving a pledge of adequate value, either to be used by him, or merely kept in his hands; or with a sufficient surety, and either with a written agreement, or before credible witnesses.

Any of these, by which confidence may be *given to the lender*, should be furnished. They are mentioned generally.—MISRA.

The word *here* employed intends comprehensive illustration. If, therefore, the lender have in his power, by bailment or otherwise, property of more than adequate value belonging to the borrower, this security is also intended by the text. In like manner, where land belonging to any person is taken by another for the purpose of tillage, if the landlord ask a loan of the cultivator, and he advance the loan even without receiving a mortgage of the land, in that case, although there be other creditors, the cultivator, and no other creditor, takes the produce of that land until his loan be discharged: such is the practice. So, if the husbandman ask a loan of his landlord, the landlord, who advances a loan to the husbandman, and no other creditor, seizes the produce of his land, at the time of gathering the harvest, for the payment of the loan he has advanced: this custom also subsists in this country; and on this point there is also the authority of a text of CÁTYÁYANA (281); for there is no objection to consider land and the like as comprehended, in that text, under the word "capital." This will be discussed under the head of Payment of Debts: *but* hence *it appears, that* land or the like, on which there is such a lien, may be included *in the terms of the text*. So in other cases also; for it only intends some ground of confidence in future repayment.

"A pledge of adequate value;" by the price or use of which the debt may be discharged with interest: such a pledge, whatever it be. It relates both to the pledge to be used, and that to be merely kept in his hands. The use

of this condition, *that it should be of adequate value*, is obvious. Both names for a pledge (*ádhi* and *bandha*) are employed by VRĬHASPATI, in a text which will be quoted (80), as bearing the same sense : but here a distinction appears to be intended by the separate mention of them. That distinction, on the concurrent opinions of CHANDÉSWARA, VACHESPATI, BHAVADÉVA and others, is as follows : "*Adhi*" is a pledge to be used ; such as land pledged with its produce ; a cow, a female buffalo or the like, with her milk ; a tree or the like, with its fruit ; an elephant, a horse, an ox or the like, to be used for burden ; distinguished by this circumstance, that they are not necessarily impaired by use. "*Bandha*" is a pledge not to be used, but merely kept ; as a copper caldron or the like, a mass of iron or ingot of gold and the like ; distinguished by this circumstance, that they are, or may be, impaired by use. This will be explained at large in the chapter on Pledges. It may be noticed by the way, that a thing pledged should not be hypothecated by the creditor to another person as security for a debt contracted by himself.

"With a sufficient surety ;" with a good sponsor : one by whom the sum can be paid. BHAVADÉVA.

The sufficiency of the surety consists in his power to enforce the punctual payment of the money. CHANDÉSWARA.

By these *glosses* both the surety for the advance, and the surety for repayment, are described. One gives security against the absconding of the debtor ; he is surety for appearance, and makes a promise in this form, "I will produce this man." He, in confidence of whose assurance a loan is advanced to any person, is sponsor for honesty ; he affirms "this person is unexceptionable." The sufficiency of the first of these consists in his ability to produce the man if he abscond ; or, by keeping *in view* the debtor's property, to distrain his effects ; and so forth. The sufficiency of the last consists in his skilful judgment of a man's veracity, and so forth. The sufficiency of all *sureties* consists principally in wealth adequate to make good the debt. Accordingly this is actually expressed by BHAVADÉVA. But in fact, honesty should be considered as a requisite to the sufficiency of a surety ; for much time would be wasted in litigation if a dishonest surety were accepted. It should be understood, that a person, such as a spiritual parent, from whom money cannot be recovered by harsh importunity and other *compulsory* methods, is not a sufficient person in a matter of suretyship, however venerable he be. Of this wise persons may judge from the *simple* exertion of their own intellect. A text of VRĬHASPATI (142) is authority for distinguishing four sureties. That text is explained in the chapter on Sureties.

"With a written agreement" (11) ; with a written contract of loan : such a writing is noticed by VRĬHASPATI, cited by BHAVADÉVA.

12.

VRĬHASPATI :—That mutual instrument which is executed when the loan is delivered and accepted, is called the written contract of loan.

The will to make and receive a loan is the cause *of the contract*. The construction therefore is, "when the loan is delivered and accepted by the will of the parties respectively," &c. What kind of writing should be given, is declared by NÁREDA, quoted in the *Vyavahára-tatwa*.

13.

NÁREDA :—Written evidence is declared to be of two sorts; *the first,* in the handwriting of the party himself, which need not have subscribing witnesses; and *the second,* in that of another person, which ought to be attested: the validity of both depends on the usage established in the country. (15)

An instrument in the handwriting of the party himself is good evidence, even though it be unattested; and, in that of another person, if attested: such is the construction *of the text* by the relative order *of the terms.* "On the usage of the country;" on such usage, in respect of writings, as subsists in each country: *on that usage the validity* of both *depends;* namely, of an instrument in the handwriting of the party himself, and of one in the handwriting of another person.

The *Vyavahára-tatwa.*

"Even though it be unattested:" this expression suggests, that an attested instrument *in the handwriting of the party* is also included, *under this text,* as a valid document. Thus the sense is, that any attested writing is good evidence; and one in the handwriting of the party himself is good evidence, even though it be unattested. But, in fact, it is the practice of our country to call to witness the divine form of justice (*Srí* DHERMA) on such writings. An instrument in the handwriting of another person ought to be attested; and there the witness should be human: but even to such writings it is usual to attest the divine form of justice. However, should the party deny an instrument in the handwriting of another, and to which the name of justice is subscribed as *sole* witness, how can the judge's doubts be satisfied? The ingenuous evidence of witnesses should therefore be adduced to prove an instrument drawn in the handwriting of another person.

Is not the scribe himself such *competent* evidence? This should not be objected; for YÁJNYAWALCYA declares dubious the evidence of less than three witnesses: *and properly* these witnesses should be of the same class with the party; but, if that cannot be, they may be of other classes.

14.

YÁJNYAWALCYA :—There should *in general* be three (16) witnesses; persons who take delight in acts ordained in the *Véda* and in sacred law books; and properly, they should be of the same sex and class

(15) According to the ancient *Roman* Law, stipulations differed from *promises* and *pacts,* inasmuch as the former might have been made in simple and ordinary language, the latter only in prescribed and solemn language. The former might have been made by writing between persons absent; the latter by words only and between persons present.

So, likewise, among the ancient *Romans,* all voluntary nominate contracts were written either by the parties themselves, or by one of the witnesses, or by a domestic secretary of one of the parties called a *Notarius;* the contract, when finished, was carried to a magistrate, who gave it a public authority by receiving it *inter acta,* furnishing each of the parties a copy thereof under his seal. Vide POWELL, "On Contracts and Agreements," vol. I, p. 339.—EDITOR.

(16) According to YÁJNYAWALCYA, even one person, provided he be an intelligent follower of the *Védas,* may, with the consent of both parties, be a sufficient witness in a dispute.—In this case, the witness must be regarded as acting the part of an umpire.—EDITOR.

with the party for whom they give evidence:(17) but, if that cannot be, those of all classes may be examined.*

Here it should be noticed, that attested writings only ought to be given; for, *although* YÁJNYAWALCYA (15) declares an unattested instrument in the handwriting of the party himself sufficient evidence, yet he also declares it to have no validity if it were obtained by force or fraud: when, therefore, a judicial proceeding is subsequently held, should the defendant plead that it was obtained by force or fraud, then the arbitrators and the king may doubt its validity. For this reason a writing, which has subscribing witnesses, is preferable.

15.

YÁJNYAWALCYA:—But every document which is in the handwriting of the party himself, is considered as sufficient evidence even without witnesses, unless obtained by force or fraud.

"*Upaḍhi*" *here* signifies fraud.

'Such usage, in respect of writings, as subsists in each country.'† In some countries the practice is as follows: After an auspicious term (*as* Srí)(18) preceded by an epithet allusive to memory (*as* smaranasíla), the name of the lender is written in the seventh case and plural number; and the name of the borrower is inserted with the termination of the sixth case before the word "user" *or borrower* (*C'hádaca.*) Next, the word "*Casya*" is written: after which a word expressive of bond or obligation for debt is inserted, and declared by the word "this" subjoined. Next, the meaning of the parties is stated, the stipulation of interest, the promise of payment, and a binding clause; then, after dating the instrument by the solar month and day, the debtor's name is again written, with the termination of the sixth case, on the right hand side *of the paper;* and the designation of place is added. The names of the witnesses are written on the back of the instrument. "The usage established in the country" intends this and other forms. Whatever be the usage in each country, that only should be observed in that country: and the practice above stated is almost *literally* directed by YÁJNYAWALCYA: for he suggests, that the lender's name should be first written, and that the instrument should be dated by the year, month, and day.

16.

YÁJNYAWALCYA:—Whatever contract shall have been concluded by mutual consent, a written memorial of it should be attested, after the lender's name has been first inserted:

(17) MANU gives a similar direction as a general rule. In his *Institute*, Ch. V, v. 68 he declares thus:—"Women should regularly be witnesses for women; twice-born men, for men alike twice-born; good servants and mechanicks, for servants and mechanicks; and those of the lowest race, for those of the lowest." He, however, makes an exception immediately after. "But any person whatever who has positive knowledge of transactions in the private apartments of a house, or in a forest, or at a time of death, may give evidence between the parties."—EDITOR.

* The first and last parts only of this text were cited; I quote it at large from other Digests.

† Comment cited from the *Vyavahára-tatwa* on v. 13.

(18) *Srí* or *Shrí* signifies prosperity, wealth, fortune; also their personification as a goddess, the goddess of prosperity, and wife of VISHNU: the term is used as an honorific prefix to the names of persons or divinities, and likewise at the beginning of manuscripts, letters, and other documents; and when intended to be very complimentary, the term is repeated or the repetition is indicated by a numeral.—EDITOR.

2. It should bear the year, month, half month, and day, with the designation *of the debtor,* by his name, class, and the like.*

The epithet allusive to memory is suggested by a text of MENU. It conveys, that this *instrument* is written for the sake of *assisting* memory.

17.

MENU:—Even in the space of six months men forget occurrences: therefore where letters and writings anciently invented by the beneficent Creator.(19)

By the custom of the country, instruments are *now* written in the dialect of the *Yávanas*†(20); but among eminent *Bráhmanas* and others, writings are also drawn in another language. In some written contracts for auspicious rites, as marriage and the like, the word "*swasti*" is first written: its intent is *a prayer;* may this rite be auspicious! This is noticed by the way.

18.

YÁJNYAWALCYA:—When the transaction is completed, the borrower should sign his name with his own hand; *adding,* "what is above written has the assent of me, son of such a one."

This suggests, that the debtor's name should be written above the contract. We do not determine whether additional matter, as titles and the like, and omissions, as leaving out the name of the party's father or the like, be founded on practice, or on the reason of the law, or, *in the last instance,* originate in indolence.

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* The first hemistich is not here cited. I insert it from a subsequent quotation in Book V, collated with the code of YÁJNYAWALCYA.

(19) From the frequent allusion to "writing" made in the laws of MANU, YÁJNYAWALCYA &c., it would appear that this art has been practiced among the Hindus in very remote ages. It is however remarkable that in the history of early Indian literature, no traces are found of the existence of the materials connected with writing. The ordinary modern words for book, paper, ink, writing, &c., are said not to be discovered in any *Sanskrit* work of genuine antiquity. The *Bráhmans,* observes professor MÜLLER, "never speak of their *granthas* or books. They speak of their *Véda,* which means "knowledge." They speak of their *Sruti* which means what they have heard with their ears. They speak of *Smriti* which means what their fathers have declared unto them. We meet with *Bráhmanas,* i. e., the sayings of *Bráhmans;* with *Sutras,* i. e., the strings of rules; with *Vedangas,* i. e., the members of the *Véda;* with *Pravachanas,* i. e., preachings; with *Sastras,* i. e., teachings; with *Darsanas,* i. e., demonstrations; but we never meet with a book or a volume, or a page." The words for ink *(masi, kali, mela, gola)* and pen *(kalama),* have all a modern appearance; and as to *Kayastha,* the name of the writer-caste, proceeding from a *Kshatriya* father and a *Súdra* mother, it does not even occur in the list of mixed tribes given by MANU. Vide MÜLLER, "History of Ancient Sanskrit Literature," pp. 497-524, for an interesting account of the "Introduction of Writing among the Hindus."—EDITOR.

† The Muslemáns.

(20) The term *Yávana,* meaning a foreigner, was applied originally by the early Hindu writers to the *Ionians* or Greeks; and probably also to Græco Bactrians: but in later times to the *Arabs* and *Mahommedans,* and likewise to Europeans. In a passage in the *Harivansa* cited by Professor MAX MÜLLER, the following notice is found descriptive of the cust[om] peculiar to several foreign nations; "The *Sákas* have half their head shorn; the *Yá[vanas]* and *Kambojas* the whole; the *Paradas* wear their hair free; and the *Pahlavas* wear bea[rds]" ("History of Ancient Sanskrit Literature," page 54.) The "*Yávanas*" alluded to in [the] above passage evidently refers to the Greeks,—whilst the *Sákas* and *Pahlavas* seem to point out to the Scythians and Persians.—EDITOR.

"Half a month" (16); a side *of the month, that is* "*a fortnight.*"(21) "By his name;" by the name of the debtor. "His class;" the sacerdotal or other class. "And the like;" the *Véda which he follows in solemn rites*, and so forth.

19.

YÁJNYAWALCYA declares the form of attestation:—And the witnesses should sign *their names* all together in their own handwriting, after writing the name of their fathers and so forth; *adding,* "I, son of such a one, am witness to this *writing.*"

Here it is, in substance, expressed, that the omission of the name of the witness's father is founded only on usage. If the instrument be in the handwriting of another person, the writer of it should add at the bottom of that instrument, "written, at the request of both parties, by me, such a one, son of such a one."

20.

YÁJNYAWALCYA:—Let the writer next subscribe, at the end *of the writing*, "this *has been* written, at the request of both *parties*, by me, such a one, son of such a one."

But the practice is for the scribe merely to sign his name with the letters ऋम (*standing for* رقم). All this is *only* mentioned to obviate the supposition, that the *forms of* writings, which occur in practice, are not directed by Sages.(22)

If the debtor, or a witness, be illiterate, the following text directs the form to be observed in that case.

(21) The Hindus class their years in cycles of sixty, each of which bears an appropriate name. These years are calculated according to the lunar system, which appears to have been the most anciént method of computing time in India. Each lunar month is divided into two portions called *pakcha*, of which one is named *Sukla* or *Sudha* "the bright half," the other *Krishna* or *bahula*, "the dark half;" and each of these two portions contain fifteen *tithulu*, which may be termed "lunar days;" reckoned from new moon to new moon, and not from full moon to full moon, as is the practice at Benáres. When the *Saka* year is employed, it denotes especially *the Saka* or Æra of a prince of the South of India named SÁLIVÁHANA, commencing from the 79th year of the Christian æra. In documents executed by natives of India among themselves, all these particulars are entered, as required in the text.—EDITOR.

(22) The words *Sásanam*, *patram*, and *chittu*, are the same in meaning, though somewhat varied in use. The two former are *Sanskrit*, and the latter, adopted in the *Tamil*, evidently from the *Hindi*, *Chitthi*, whence the English *Chit* for a Note. These terms are ordinarily employed to denote any deed, instrument or writing, &c. There are various descriptions of documents, according to the nature of the transaction to which they relate. In common dealings the following are chiefly met with:—

Ottu Chittu, or *patram*, a mortgage deed.

Udanpadiké Chittu, a deed of agreement.

Mél-udanpadiké Chittu, a supplementary agreement implying the existence of some previous deed.

Bhógapatram, a deed of temporary assignment.

Bhú-dána patram, a deed of gift of land.

Dharmadána-patram, an assignment of land for charitable purposes.

Tavani Kriya-patram, a sale of land, &c., redeemable within a fixed period.

Suddhakriya-patram, an absolute bill of sale.

21.

VYÁSA :—But a borrower, who is unlettered, should direct another person to subscribe his *declaration of* assent; or a witness, *in the same predicament, should cause his name to be signed* by another witness, in the presence of all the witnesses.

When these and other local usages are observed, then an instrument in the handwriting of the party himself, and one in the handwriting of another person, are valid, and good evidence *of contracts*. Such is the meaning of the Sage, as expounded by authors. But in fact all this should be considered as intending such a document as may remove the doubts entertained by honest arbitrators or by the king. Else, if all *the parties*, the borrower, the lender, the witnesses, and the writer, be unacquainted with the forms of writings, and a creditor could not recover a debt, though really lent, notwithstanding the existence of an attested writing in any irregular form, there would be a failure of justice on the part of the king. Again; if the instrument were not subscribed by witnesses, but it be said by a witness, "I know this instrument," and the instrument be admitted in evidence by the arbitrators on any arguments, it is an attested instrument. This is mentioned by the way; the rest may be learnt under the title of Judicial Procedure: but something has been said, in this place, to make known the sort of writing, by which a monied man, who advances a loan, may be secure from losing his cause, should a dispute afterwards arise. This we deem reasonable.

"Before credible witnesses" (11): this is another case of written agreements; for the presence of witnesses is suggested by the form for drawing written contracts; and the sense of the text appears to be this: He should advance a loan, on receiving a pledge to be used by him, together with a

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The term *Sásanam*, in addition to its signification of a written engagement or contract, has reference especially to a royal order or edict, or a royal grant; which, when inscribed on stone is designated, *Silásásanam;* and when engraved on copper plates, *Támrasásanam*.

Deeds of gift generally terminate with some apt quotation or aphorism relative to the use and benefit of donations, followed by imprecation on those by whom the grant is voided. The following *Sanskrit* stanza is the one commonly found at the end of documents of this description.

Svadattá dvigunam punnyam paradattánu pálanam:

Paradattápahárėna svadattam nishp'halam bhavėt.

Translation:—"The protection of that which has been given by another is more meritorious than one's own gift; and by seizing that which another has given, one's own gift becomes fruitless."

It may as well be stated in this place that in order to constitute a sale or gift of land valid and complete, the vendor or donor should, according to special practice, convey his ownership in the soil, extending over eight particular incidents called *Ashtabhógam*, or "the eight rights." These are specified in the subjoined *Sanskrit* couplet:

Nidhinikshépa páshánam siddha sádhya jalámritam;

Akchiny'a ágámi samyuktam ashtabhógá samanvitam.

Meaning the following particulars:

1 *Nidhi*, treasure trove. 2 *Nikshépa*, property deposited on the land not claimed by another. 3 *Páshána*, mountains, rocks, uncultivable or rocky land, and their contents and products, as mines, minerals, &c. 4 *Siddhi*, all cultivable land yielding produce. 5 *Sádhya*, the produce from such land. 6 *Jalámritam*, rivers, tanks, wells and their produce. 7 *Akshini*, privileges actually enjoyed. 8 *Agámi*, prospective rights and privileges.

In many early as well as modern documents, the above eight rights are specifically mentioned, and absolutely aliened to the vendee or donee.—EDITOR.

written agreement : this is one case. He should advance it on receiving such a pledge before credible witnesses : this forms a second case. So likewise a loan made on a pledge to be merely kept in his hands, forms two cases (*according as it is transacted by a written agreement, or before credible witnesses*) ; hence arise four cases. Again ; two cases arise also on loans made with a sufficient surety ; and the possible cases are six in number. Alluding to this, MISRA has said ; " any of these, by which confidence may be *given*, should be furnished." Consequently any one of these six modes, by which confidence may be given to the lender, should be adopted. Here a pledge to be used, or merely kept, as well as a surety, are intended to give confidence to the lender ; and the writing and witnesses, to prove the truth of the loan, if a judicial proceeding be held at a subsequent time.

22.

NÁREDA :—In this *contract* there are two things which give confidence *to the lender*, a pledge and a surety ; and two which afford clear evidence, a writing and attestation.

" Confidence ;" assured expectation of thereafter receiving the loan advanced : in some instances a surety, in others a pledge, *give such confidence ;* for this coincides with the former text (11). But here the word pledge (*ádhi*) signifies both a pledge to be used and one to be kept. " Clear evidence ;" certain proof ; sometimes a writing, sometimes attestation, sometimes both, are required, according to circumstances, for the sake of proof in case of dispute.

It should be here noticed, that both texts (11 and 22) are ethical precepts ; for they exhibit causes of present evil. If, therefore, infringing these rules, a man deliver a loan without a pledge, or writing, or the like, he violates not his duty : and if the debt be any how proved, the debtor shall be compelled by the king to repay it to his creditor. Hence the practice of advancing loans without pledge or writing, in some instances of extreme confidence. But excessive confidence should be nowhere reposed ; for the *Herivansa* directs, " Place not confidence in what is unworthy of confidence, nor excessive confidence *even* in what is worthy of confidence :" and the adage expresses " mutable mind, mutable wealth."

In like manner the text of CÁTYÁYANA and NÁREDA* (8 and 10) are ethical precepts ; for the text points out a present evil, " the lender cannot *in general* recover, &c." Consequently there is no breach of duty in lending anything even to women ; on the contrary, it is a duty to support unprotected persons, even though it be done by advancing loans : and if the debtor be able to discharge it, the king should enforce payment of such a debt. But a man who infringes the rule, and institutes a suit *on such a debt*, incurs censure. To enlarge would be vain.

Thus a loan should not be advanced *by a money-lender*, without confidence and means of proof : and the meaning of the phrase, " in what form a loan should not be made," becomes evident.

* It is not expressed in the original, which is the second text alluded to ; I supply it from conjecture.

CHAP. II.

ON INTEREST.

SECT. I.—*On Legal Interest in general.*(23)

SUCH interest, as may be taken without a breach of duty on the part of the creditor, is a rule (*dherma*) for delivery *by the creditor.* Or the nature of a thing may be signified by the word *dherma:* as it is the nature of robbers to hurt living creatures, so it is the nature of a loan, that it should produce to the lender the principal sum advanced, and interest in addition thereto. Thus interest is signified by the term "rule for delivery." MENU propounds that interest.

23.

MENU:—A lender of *money* may take, in addition to his capital, the interest allowed by VAŚISHT'HA, an eightieth part of a hundred by the month.(24)

"Allowed *or declared* by VAŚISHT'HA;" this shows that it has been authorized by VAŚISHT'HA. Thus, such interest is allowed by all Sages, and is therefore legal: by taking it, a man does not violate his duty. "In addition to his capital;" actually increasing the creditor's capital, or calculated to do so: *such interest* he may require. But if it be explained, "increasing the debtor's capital," *the sense is,* through the medium of moral worth: by discharging the debt with interest, immoral conduct is avoided, and increase of moral worth attained; hence wealth is *also* increased. The purport is, that the money-lender may actually receive such interest; for CUL-

(23) The Hindu Law permits interest to be taken (with some exceptions), and has prescribed the rates to be received with or without a pledge or surety. The legal rates, however, vary according to the caste or class of the borrower; and it will be observed in the course of the work, that considerable difference exists among commentators, as to the construction of the texts which respect the limitation of interest, and the invalidity, or immorality only, of various loans and contracts. Vide HARRINGTON's Analysis of the Bengal Regulations, vol. 1, page 196; second edition; where much information will be found relating to the History of the Law of Loans, Interests, &c. By Act No. XXVIII of 1855, the question regarding the rate of interest to be levied on documents, has been set at rest; and a uniform rule introduced throughout the British Empire in India.—EDITOR.

(24) This would be fifteen *per cent. per annum,* and with the security of a pledge; but it will be seen in the sequel that much higher interest, under other circumstances, is allowed.—EDITOR.

LÓCABHATTA expounds it, "one who subsists by interest, may take, &c." It might also signify, "a loan may produce the interest allowed by VAŚISHT'HA, &c." And it is also expounded, "a borrower may pay the interest allowed by VAŚISHT'HA."

What is that interest? The Sage propounds it; "an eightieth part of a hundred by the month." The principal should therefore be divided into eighty parts; and so much as is the quantity of one part, he may take in the same kind of wealth by way of interest, in addition to the principal: if, therefore, a loan, amounting to one hundred *suvernas*, be divided into eighty parts, one part contains a *suverna* and a quarter; and the interest in this case is one *suverna* and a quarter. "By the month;" at the end of the month.

It is said by some lawyers, that, a hundred being specified in the text, an eightieth part is the rate of interest then only when the loan amounts to a hundred: hence it appears, that the rate of interest varies when the loan is more or less; and such a practice is observable in some countries. On this we remark, that no special rate of interest for loans exceeding a hundred, or falling short of a hundred, has been recorded by any Sage. MENU has not specified whether it be a hundred shells (25) or a hundred *suvernas*; and we shall explain, in its proper place, the text of HÁRÍTA (30) as intending the rate of two in a hundred. But here we consider "a hundred" as a mere example; the rate is the same on less sums. VAŚISHT'HA expressly declares the rate of an eightieth part on less than a hundred.

24.

VAŚISHT'HA:—Hear the interest for a money-lender declared by the words of VAŚISHT'HA: five *máshas, or one suverna* for twenty *palas, or eighty suvernas,* he may claim *and should receive* each month: thus the law is not violated.

25.

GÓTAMA:—The legal interest for twenty *palas* is five *máshas* a month.

On this some remark, that the *másha* is declared by MENU to contain five *crishnalas* or *racticás*, ("five *crishnalas* are one *másha*, and sixteen such *máshas* one *suverna*;") and the same *másha* is thus explained by AMERA, "the first *másha* contains five seeds of the *gunjá*." (26) Consequently five *máshas* are equal to twenty-five *racticás*; and this is the rate of interest on a loan amounting to twenty: such is the ascertained sense. On the question, "twenty of what denomination?" the *suverna*, which is mentioned after

(25) The *Kauri*, corruptly *Courie*, is a small shell (*Cypræa Moneta*) used as coin in most parts of India, and especially in Bengal. In account, four *kauris* are equal to one *gandu*, and eighty *kauris* to one *pan*.—EDITOR.

(26) The hemp plant—*Cannabis sativa*, or according to some authorities, *Cannabis Indica*.

I give below particulars of the present weights and value of some of the coins, &c., mentioned in the text. The account is extracted from Professor WILSON's "Glossary of Indian Terms:"—

Másha.—An elementary weight in the system of goldsmiths' and jewellers' weights throughout India; and the basis of the weight of the current silver coin: it is variously reckoned at 5, 8 or 10 *ratis*, or seeds of the *Abrus precatorius*, which usually weigh about 2 grains troy; the average weight of the *másha*, according to Mr. COLEBROOKE, was $17\frac{3}{8}$ grains: the actual weight of several examined in England, sent from different parts of India, varied from $14\frac{7}{10}$ grains to $18\frac{1}{2}$ grains; the Benares *Másha* weighed $17\frac{7}{10}$ grains. Mr. PRINSEP, from the weight

stating the quantity of a *másha*, both in the text of MENU and in that of YÁJNYAWALCYA, should be taken, ("five such *crishnalas* are a *másha*, and sixteen such *máshas* a *suverna*;") for five *máshas* can only be the interest on twenty such *suvernas*. Thus a *suverna*, consisting of sixteen *máshas*, contains eighty *racticás*; its eightieth part is one *racticá*, and the eightieth part of twenty *suvernas* is twenty *racticás*. Twenty-five *racticás* are intended by the rate of five *máshas* (24 and 25). (27) Consequently an eightieth part is only the rate of interest on a debt amounting to a hundred *suvernas*; but on a smaller debt, the rate of interest is higher. This is intended by VAŚISHT'HA and GÓTAMA; and such, it may be argued, is the legal rate on fifty or sixty *suvernas*, or the like, and practice is observed to conform thereto. How then is it said, 'the rate of interest *on less sums* has not been recorded by any Sage?' And why is it said, 'VAŚISHT'HA expressly declares the rate of an eightieth part on less than a hundred?'

The answer is this: MENU, after saying "a lender of money may take the interest allowed by VAŚISHT'HA," adds, "an eightieth part of an hundred." Since it is thence inferred, that VAŚISHT'HA has propounded the rate of an eightieth part, his text must be so explained as to state an eightieth part.

of several *Akbar-shahi* rupees, the standard weight of which was 11¼ *Máshas*, valued the latter at 15½ grains: as now fixed by law, as one-twelfth of the tola of 180 grains, the *Másha* weighs 15 grains.

Suvarna or *Swarna*—is equal to sixteen *Máshas*, which, at 5 *rattis* to the *Másha*, make the *suvarna* much the same as the *tola*, or from 175 to 180 troy grains, according to the variations in the value of the *ratti*.

Pala, vernacularly, *Pal*, or *Pal*, corruptly *Pull*—This measure of weight of gold or silver, varies in value, being equal to four *suvarnas*, to four or to eight *tolas*, or, in common use, to three *tolas* two *máshas* and eight *hattis*, or about 585 grains troy. In Cuttack, it is a weight for brass, &c. being the twentieth of a *bisha*, or equal to four *karshas*, or about 520 grains. In the Dakhin or Deccan, it is a weight of twenty-eight *dabbus*, used in weighing ghee, butter, &c. In Kumaon it is a weight of about 520 troy grains.

Karsha, *Karshapana*—is equal to 16 *máshas*, or about 180 troy grains; in Uriya, it is written *Karisa*, and means a brass weight of four *márhas*.—EDITOR.

(27) In addition to the particulars given in the preceding note, relative to the principal Indian weights alluded to in the text, the following table, showing the relative value of coins, Gold, Silver, &c., will, it is trusted, prove interesting to the reader. The information has been drawn from MANU, YÁJNYAWALCYA, and other sources.

3 Atoms	= 1 Mote or particle of dust.
8 Motes	= 1 Poppy seed or a nit.
3 Poppy seeds or 3 nits	= 1 Black Mustard seed.
3 Black Mustard seeds	= 1 White Mustard seed.
3 White Mustard seeds	= 1 Barley corn.
3 Barley corns	= 1 *Krishnála*, (or berry of the *ganja* shrub.)
GOLD.	
5 *Krishnálas*	= 1 *Másha* (or kidney bean, *Phaseolus radiatus*.)
16 *Máshas*	= 1 *Suvarna*.
4 *Suvarnas*	= 1 *Pala*.
10 *Palas* (according to MANU)	= 1 *Dharana*.
SILVER.	
2 *Krishnálas*	= 1 *Másha*.
16 *Máshas*	= 1 *Dharana*.
10 *Dharanas*	= 1 *Pala* or *Satamána*.
4 *Suvarnas*	= 1 *Nishka*.
COPPER.	
4 *Karshas*	= 1 *Pala*.
1 *Pana*	= 1 *Karsha*, i. e. one-fourth of a *Pala*.

It is not unlikely as MR. ELLIS conjectures, that the word *Cásu* (*Anglice* cash,) the lowest denomination of copper coin, 80 being reckoned to a *fanam*, has been derived from the *Sanskrit Karsha*, mentioned in the ancient Law-books. ANGELO, in his *Gazophylaceum Linguæ Persarum*, gives a Persian word of the same signification and sound, as Italice *cassa*, Latine *capsa*, Gallice *caisse*.—EDITOR.

That exposition on the text of MENU, which makes the interest allowed by VAŚISHT'HA one case, and an eightieth part of a hundred another case, is not approved by CULLÚCABHATTA. Therefore, the interpretation approved by CHANDÉSWARA, BHAVADÉVA, VÁCHESPATI MISRA, and others, should be admitted, as follows. In these texts twenty *palas* are intended; and the *pala* should be taken at four *suvernas*, as stated by MENU and YÁJNYAWALCYA. Twenty *palas*, therefore, are equal to eighty *suvernas;* and the eightieth part of that sum, or one *suverna*, is the monthly interest. But here *máshas* are mentioned. This apparent incongruity is thus reconciled: the *másha*, containing five *crĭshnalas*, as stated by MENU and YÁJNYAWALCYA, must not be taken (for it is not applicable); but the *másha* stated by VRĬHASPATI, as quoted in the *Retnácara* and *Chintámeni*, "a *másha* is considered as the twentieth part of a *pala*." Thus the twentieth part of a *suverna*, containing eighty *racticás*, is equal to four *racticás;* and the twentieth part of a *pala*, containing four *suvernas*, is certainly equal to sixteen *racticás*, and those make one *másha;* five of these are equal to eighty *racticás*, or one *suverna*. Thus there is no inconsistency. Here *suverna* is of the masculine gender; for it is so employed by MENU and YÁJNYAWALCYA, and is so exhibited in the same sense by AMERA;(28) but, in the sense of gold generally, it is of the neuter gender, for AMERA so exhibits it in this sense.

The same should be also understood of other things. The monthly interest on a *purána* is thus explained: A *pana* consists of eighty shells, and a *pana* is the quantity of a *carsha* of copper, as mentioned by MENU; "but a *carsha* (or eighty *racticás*) of copper is called a *pana*." The *carsha* is the fourth part of a legal *pala;* hence expositors say, a *pala* contains four *carshas*. Consequently the weight of eighty *racticás* of copper is a *pana;* on this ground, the Ancients established it *also* at the value of eighty shells: accordingly it is familiar in practice, that eighty shells make a *pana*. A *purána* contains sixteen *panas*, according to the *Retnácara;* and *purána* is also practically noticed, for sixteen *panas* of shells, in penances and expiations, and on other occasions. Now the eighteenth part of a *pana* is one shell; of a *purána*, sixteen shells; of a hundred *panas*, a hundred shells, or one *pana* and a quarter; of a hundred *puránas*, sixteen hundred shells, or twenty *panas*. Or if the money be in silver coins stamped with legends, the interest on a hundred such coins is one coin and a quarter: for, on eighty pieces, it is one piece; and, on twenty pieces, a quarter; which, added together, make one piece and a quarter. But, if the principal be a single piece of money, the rate must be settled by its value. If its value be four *puránas*, then sixty-four shells are its eightieth part; and so in all cases.

Again: If the debt consist of kine, or the like, the interest should be settled on the value. It should not be affirmed, that they cannot constitute a debt; for the limit of interest on cattle is mentioned (65.) Why such a practice does not occur, we know not. Something, however, may be mentioned to explain the *received* distinctions *in these cases*. If a man happen to deliver a cow, or the like, as a loan, the interest may be received on her value; *but* a great offence is committed; for the sale of a cow is forbidden in moral law: however, a goat, a calf, or the like, may be taken by way of

(28) AMERA or AMARA SINHA is the celebrated compiler of the *Sanskrit* vocabulary, called from his name *Amara kósha;* and also cited under the title of *Trikánda*, or the "Three Books," owing to its division into as many parts. AMARA appears to have belonged to the sect of BUDDHA. He is reported to have lived in the reign of VIKRAMÁDITYA; and to have formed one of the ornaments of the Court of RÁJA BHÓJA: he must, hence, have flourished nearly a thousand years ago. The *Amara kósha* has been edited by MR. COLEBROOKE with an English Interpretation and annotations, and published at Calcutta in 1808.—EDITOR.

interest, without any offence on the part of the receiver; and the debt should be discharged by returning the thing itself, or something of the same nature; as already stated by MISRA. But, in this case, it should be returned unblemished; or another cow, or the like, or other thing of equal value, should be delivered. Whatever it is forbidden to sell and give away, should not be delivered as a loan; for the offence is equal. But a *Bráhmana* may advance lac, salt, or the like, by way of loan; for there is no more offence in lending, than in giving those things; and the offence is restricted to the sale of such things; however, at the time of repayment, the value of the salt, or the like, and of interest accruing on it, should not be received; for *that would equal* the offence of selling it. The interest should be of the same nature with the thing lent; for interest is propounded at the eightieth part of the thing lent.

To revert to the explanation of both texts (24 and 25); the institutes of VAŚISHT'HA and others were composed by their pupils, who heard the purport of what they record, from the mouth of VAŚISHT'HA and the rest: hence it is said (24), "declared by the words of VAŚISHT'HA;" as in the ordinances of MENU, it is said, "MENU ordained."

"Legal," in the text of GÓTAMA (25), signifies justifiable in law, that is, not illegal; for it coincides with the expression in the text of VAŚISHT'HA, "thus the law is not violated" (24.) Or the sense may be this; he who takes interest allowed by codes of law, which may produce religious merit by means of pious oblations made therefrom to Deities and *Bráhmanas*, and so forth, has the complete benefit thereof, if he actually do make such oblations to deities and priests; not so he who celebrates rites with wealth acquired by theft or by other nefarious means. As is declared by

MENU:—Neither a priest nor a military man, *though distressed*, must receive interest on loans;(29) but each of them, if he please, may pay *the* small interest *permitted by law, on borrowing* for some pious use, to the sinful man, *who demands it.**

Which is expounded by CULLÚCABHATTA, "may advance *a loan* on small interest, for some pious use."

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(29) The ancient Jews were inhibited, under the MOSAIC dispensation, to lend money on interest or usury to their brethren in distress. *Vide* EXODUS, xxii, 25; LEVITICUS, xxv, 37; and also DEUTERONOMY, xxiii, 19,—which passage distinctly enjoins: "Thou shall not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury." This restriction was limited only to transactions between the Jews; for in the verse immediately following, they are permitted to lend money upon usury "to strangers." As regards the law in DEUTERONOMY, referred to, GROTIUS among other reasons and explanations, assigns this one: "that the chief riches of the Jews lay in husbandry and money, whereas most of the neighbouring nations made vast returns by merchandise: and therefore, usury was allowed the Jews in their dealings with them, which, with very good reason, was forbidden to be taken of another; for usury laid upon husbandmen is everywhere oppressive." To the above exposition may be added the fact that the law in question was eminently calculated to endear members of a community to one another, and to enforce the exercise of charity and liberality among fellow subjects.

The Mahommedan law prohibits the taking of interest for the use of money upon loans from one Musulmán to another; but it has not regulated the rate of it when allowed to be taken from a hostile infidel. Hedaya, book xvi, ch. viii, "of *Ribba* or Usury," vol. II, p. 489, &c. For some pertinent remarks on the subject of interest and loans, consult MONTESQUIEU, "Spirit of Laws," book xxii, ch. xix, *et seq.*—EDITOR.

* Chap. 10, v. 117. I do not alter the translation, which conforms to the literal sense of the text, though it consist not with the comment and the purpose of the quotation. See Book II, chap. 1, v. 23.

"Legal interest" (25); interest authorized by law, at the rate of five *máshas* for twenty *palas*. The *Retnácara*.

We expound the text (25), "the quantity of five *máshas* is the interest for twenty *palas*," or interest appertaining to twenty *palas* (*supplying the word* "*pala*" by a secondary sense *of* "*twenty*"); that interest accrues on a sum of twenty *palas*. But some read "twenty" in the fifth or sixth case (vinsatéh *instead of* vinsatih). That is wrong, for it is not approved in the *Retnácara*. The sense, according to regular construction, is thus: "the quantity of five *máshas*, as interest appertaining to twenty *palas*, is legal."

"A month;" here "*for*" must be supplied. In every text where "month" is not specified, but interest at the rate of an eightieth part, or the like, is mentioned, the word "month" must be understood: and the month is according to *sávana* time, consisting of thirty days and nights; not the *saura* month from the sun's departure from one sign to his departure from another sign. For RAGHUNANDANA, in commenting on texts quoted in the *Mala mása tatwa*, ("certain sacrifices and acts of devotion are to be regulated by *sávana** time; so is impurity after child-birth, and the like; and so are all popular and forensick transactions") says, that under the term "and the like," wages, interest, and the like, should be comprehended. Hence it is inconsistent with law to regulate civil contracts by *saura* or solar time. It would be a great disparity, were *a whole month's* interest, at the rate of an eightieth part, or the like, paid upon a loan taken on the last day of the sun's passage through one sign, and repaid on the following day; and no interest paid on a debt contracted on the first day *of the solar month*, and discharged on the last day of the same month. This should be determined by the wise.

Here interest for one month is declared by Sages to be the eightieth part *of the principal*; but if the period exceed one month, the same rate is directed for each month: since the expression implies repetition, it follows, that the interest shall be an eightieth part for every month respectively: and if the period be less than a month, it appears that the interest should be computed by a sub-division of that rate; else a disparity would arise, no interest being payable on a debt discharged within one day of a complete month.

A greater or less fine, or other *decision*, should not be regulated by very minute distinctions.

But some attend in practice even to minute variations in fines, *and the like*.

26.

VRĬHASPATI, quoted in the *Retnácara*:—The eightieth part accrues *monthly on the principal*; and if *the interest be* received, the *loan* is doubtless doubled in a third *of a year* less than seven years; *that is*, in *six years and eight months*.

"Accrues;" it is the interest for each month. If the interest be received the loan advanced is doubled. Or the seventh case may be here used in

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* VYÁSA in the *Vishnu-dhermóttara*.

the sense of the third, "the debt is doubled by accumulation of interest." In what time? The Sage replies to this question, "in a third of a year less than seven years." Divide a year of twelve months into three parts; each part contains four months; that deducted from seven years, leaves six years and eight months. Thus, if the debt amount to one hundred *suvernas*, the monthly interest is one *suverna* and a quarter; the annual interest is twelve *suvernas* and twelve quarters, or fifteen *suvernas*; the interest in three years amounts to forty-five *suvernas*; in six years to twice that sum, or ninety *suvernas*: interest for eight months is eight *suvernas* and eight quarters, or ten *suvernas*; which, added to ninety *suvernas*, make a hundred, or the same amount with the original debt: consequently, added to the principal sum, it doubles it. This is mentioned by VRĬHASPATI, to prohibit further interest, after a loan in gold, silver, or the like, has been doubled by interest. This will become evident under the title of Limited Interest.

This rate of interest is ordained, if a pledge be given; VYÁSA propounds a distinction if a surety be given without a pledge, or if neither be given.

27.

VYÁSA:—Monthly interest is declared to be an eightieth part of the principal, if a pledge be given; an eighth part is added, if there be *only* a surety; and if there be neither pledge nor surety, two in the hundred *may be taken from a debtor of the sacerdotal class.*(30)

"An eightieth part;" the eightieth. The *Retnácara*.

That is, one part in eighty parts. Here a pledge intends a pledge to be kept; for, in a gloss on the text previously quoted from MENU (23) to the same purport with this text, the *Retnácara* states, "this concerns a pledge to be merely kept." The meaning is this—In the case of a pledge to be used, since the use of the pledge is the only interest, the rate of an eightieth, or the like, is inapplicable: all this will be explained under the title of Various Sorts of Interest.

A pledge to be kept, is one which would be impaired by use; a pledge to be used, is one which is not *necessarily* impaired by use. Here it should be noticed, that if a man contract a debt, mortgaging land, or the like, to be used, and say, "the use of the land shall be the only interest," in that case, since there is no other interest but the use of the pledge, the rate of an eightieth part, or the like, is inapplicable. But if he say, "this land is mortgaged to you; paying your interest from its produce, I shall discharge the principal from the surplus; or, if the produce be insufficient, I will make good the interest, delivering either money or goods;" in that case the rate of an eightieth part is applicable even to a pledge to be used.

Is it not the law, that, when land or the like is pledged, the entire use of it should of course be taken by way of interest? On the contrary, usufruct in excess is reprehended by a text, which will be quoted from VRĬHASPATI (35, 7). It should not be argued, that a pledge delivered for use is a pledge to be used, and one delivered merely for security is a pledge to be kept. The forfeiture of the whole interest will be denounced against the

(30) It will be seen that in the case where neither pledge nor surety is given, the interest permitted to be taken is twenty-four *per cent. per annum.*—EDITOR.

unauthorized use of a pledge to be kept; and the forfeiture of half the interest, against the unauthorized use of a pledge to be used. It is said in the *Dípacalicà*, "if a pledge to be kept, that is, one which should be securely preserved, as clothes, ornaments, and the like, be used, no interest *shall be received.*" It is not said, "a pledge to be kept, that is, one not delivered for use;" but, "*a pledge to be preserved*, as clothes, ornaments, and the like." The proper place for this disquisition is the chapter on Pledges. Since many texts are there cited, to expatiate in this place would be idle.

"An eighth part is added" (27); and that is an eighth part added to an eightieth part. Hence, two *panas* less than two *puránas, or one* purána *and fourteen* panas, are received, if there be only a surety.

The *Retnácara.*

In that book, a debt amounting to one hundred *puránas* had been already supposed: hence, in this case also, the rate of interest denoted is two *panas* less than two *puránas* on a hundred *puránas*. But, in the gloss on this text, the letter M is an error of the pen, (asítyashtamabhágasahita *instead of* asítyashtabhágasahita,) for the text exhibits *sáshtábhága* with eight parts. Consequently the sense is *an eightieth part* joined to eight parts, and the portion not specified must be a sixteenth on the authority of usage. Thus, whatever be the amount of an eightieth part, eight parts are half of that amount. But, in this case, an eightieth part is twenty *panas*, and these, added to half that amount, make thirty *panas*, or two *panas* less than two *puránas*.

But some, noticing another reading in the commentary on YÁJNYAWALCYA, *shasht'hibhága*, instead of *sáshtábhága*, say, the interest should be a sixtieth part, if there be only a surety: and this, they say, is fit. If there be neither pledge nor surety, the interest is two *puránas* for a hundred *puránas*, as ordained by the text (27). If a pledge be given, twenty *panas* are the interest prescribed. But in this case, a pledge having been given, the confidence is greater; for a chattel of equal value is in the creditor's power. If there be neither pledge nor surety, no confidence exists; for payment rests on the will of the debtor: in this last case, therefore, the interest, ordained by sages for a hundred *puránas*, is greater by twelve *panas*: and this is consistent with the reason of the law. Now, if there be only a surety, confidence is given, but there is a possibility of trouble. For instance; a man advances a loan on this consideration, "if my debtor do not repay the loan, even then I shall subsequently recover it from his surety by a suit at law;" in that case trouble *may be apprehended*, for the recovery is effected by the trouble of litigation. It is therefore proper, in such a case, to take, in addition to the twenty *panas* allowed, where a pledge is given, six *panas*, or half the additional twelve *panas* allowed *on loans without security*. Now this nearly agrees *with the rate of a sixtieth part*. In dividing a hundred *puránas* into sixty parts, first take one *purána* for each part; this disposes of sixty *puránas*, and forty *puránas* remain. Again, set half a *purána* towards each part, thirty *puránas* are disposed of, and ten *puránas* remain; and each part is one *purána* and a half, *with a further fraction from the remainder*. Reduce the ten *puránas* into *panas*; the result is a hundred and sixty *panas*: setting two *panas* to each part, the portions amount to one *purána* and ten *panas*; a hundred and twenty *panas* are disposed of, and forty *panas* remain. Again, set half a *pana* to each portion; thirty *panas* are disposed of; the sixtieth part amounts to one *purána* and ten *panas* and a half, *with a further fraction*; and there

remain ten *panas*, or eight hundred *cauries*. Distribute thirteen *cauries* to each share, seven hundred and eighty *cauries* are disposed of; and the sixtieth part of a hundred *puránas* amounts to one *purána*, ten *panas* and fifty-three shells, with a fraction of one third from the remaining twenty shells, which may be *more accurately* divided by those who are skilled in the notation taught by SUBHANCARA. The amount of fifty-three shells and a third is, they say, but a small excess above the rate of interest, which, in their opinion, is reasonable; neglecting, therefore, minute differences, interest may be taken at the rate ordained by the sage, namely a sixtieth of the principal, if there be only a surety:

VÁCHESPATI MISRA, not acquiescing in either of these interpretations, expounds the text otherwise in his Digest. "An eighth part is added;" the eighth part of an eightieth part is added to an eightieth part. Hence the interest on the sum of twenty *palas* of gold, is ninety *racticás*. His meaning is this *sáshtábhága* signifies joined to one part in eight parts. *The answer* to the question, "part of what?" *is drawn* from the nearest term, "*an eighth part* of an eightieth." Thus, an eightieth being divided into eight parts, one such part is added. But the interest at an eightieth part of the principal, is ascertained in the case proposed; the eightieth part of twenty *palas* or eighty *suvernas*, is equal to eighty *racticás*, or one *suverna*; to which the eighth part of it, or ten *racticás*, being added, the result is ninety *racticás*. According to this exposition, twenty *panas*, which are the eightieth part of a hundred *puránas*, added to the eighth of that, or two *panas* and a half, make twenty-two *panas* and a half, *the rate of interest on a hundred puránas, if there be only a surety:* and the same method should be practised in the case of silver coins, and the like. On this opinion also, we do not discover why the letter M occurs in the gloss (*Ashtaménabhágéna*).

A thorough examination of these opinions, to select the best, must depend on the mental faculties of intelligent *inquirers*. On what proof or argument it is held, according to the opinion delivered in the *Retnácara*, that the portion not specified is a sixteenth, must remain a question: the other reading (a sixtieth part) is not admitted in the *Retnácara*, nor in the *Chintámeni*; for in both the text is thus explained, "an eighth part is added:" and in the commentary on YÁJNYAWALCYA, *where this reading occurs*, the text is not expounded. Whether the cerebral S be not an error of the copyist, is a question on the second interpretation. On MISRA's exposition, the question is, how the interest, where a surety only is given, should so little exceed the rate of interest where a pledge is given.

"If there be a surety;" the sense is, if there be only a surety; for higher interest would be improper, if there were both a surety and a pledge.

"If there be neither pledge nor surety (*nirádhâné*)"; here the word *ádhána* signifies both pledge and surety; hence, if there be neither surety nor pledge, two *puránas* are received *on a hundred.*

The *Retnácara.*

The derivation of the word is, "what is placed (*ádhíyaté*) for the sake of taking up a loan;"* and that description is applicable both to a pledge and a surety. The privation of both sorts of security is *nirádhána*, want of pledge and surety. Or the word *ádhána* may be restricted to pledges: thus, because an eighth part is directed to be added, if there be no pledge

* See a different etymology at v. 81.

but a surety *only*, therefore, by the regular form for general rules, and exceptions *to those rules, the remainder of the* text relates to a different case of loans without a pledge ; *that is one without pledge or surety.* Ultimately there is not, in our opinion, any difference.

On this subject an observation should be made. The servant of some, person asks a loan of a money-lender ; he replies, "give a surety or a pledge :' the servant requests his master to become his surety, that he may obtain a loan from this money-lender ; his master replies, " I will not be thy surety, but I will promise him thy wages :" accordingly the servant's master tells the money-lender, " I will not pay him his wages, unknown to you ;" and the money-lender, confiding therein, advances a loan to him. In such a case, is it a loan with a pledge, or with a surety ? Not the first ; since the servant's master only intervenes, and is not in the nature of a thing belonging to the servant, there can be no pledge : nor is it of the second description ; for this servant's master is not comprehended under any of the descriptions of sureties enumerated, sureties for appearance, for honesty, for payment, and for delivery. The servant's master does not say, " I will produce this man if he abscond ;" nor, " that man is trustworthy, and will not be averse from repaying a loan received :" neither does he say, "if the debt be not discharged by him, I will make good the sum ;" nor, " I will recover the amount from him, and discharge the debt." How then can he be a surety ? The debt must consequently be one for which there is neither pledge nor surety : this again is not true in reasoning ; for there is a motive of confidence. On this proposed case it is said, this is a debt for which a surety is given : although the servant's master is not positively comprehended in the four descriptions of sureties, yet, as that enumeration is a mere illustration, it must be admitted that such a person is a surety ; and if the servant's master break his own promise, he must discharge the debt. The interest should therefore be an eighth part added to an eightieth ; or the wages may be considered as a pledge. In that case the debtor's assent is given to the hypothecation ; and a declaration being made by the debtor to that effect, the servant's master is certainly surety for delivery of the pledge, not for payment of the debt : *but*, although there be no promise of payment, there is a lien on the *promised* delivery of the pledge, and a lien prevents seizure by any other creditor. The interest, therefore, should, in this case, be one eightieth part only of the principal. But, if he do not perform his work, then, no wages being earned, how is the debt discharged ? To this it is answered, does the servant's master dismiss him without a fault ? If so, the servant's master is amenable : the servant being faultless, and the master needing another servant, this servant should not be dismissed ; for his dismission could only originate in malice. This is consistent with reason. But, if the servant were faulty, his master would not be amenable *for dismissing him* : and, when his dismission takes place, the debt should be paid with interest, or a new pledge be given ; for this case is the case of a pledge destroyed by the act of GOD (101, &c.) But, if the servant desert his master without provocation, in that case a surety must certainly be given, if he cannot immediately discharge the debt, nor give another pledge ; or, on failure thereof, the debt from that day becomes a debt unsecured by a pledge, and bears interest at the rate of two in the hundred. A man received a loan on the mortgage of a piece of land, pointed out by him in this form, " I will pay thee from the produce of the present year ; the produce of this land is thy pledge." This debtor meditated a fraud, and gave no attention to culture, reflecting, " the produce of this land is my creditor's only ; no benefit will

arise to me from it: if no produce be obtained, what can the creditor do?" As in this case chastisement is proper, and interest should be computed at the rate of two in the hundred from the day when he neglected the culture of the land; so, in the case supposed, where the servant quits an unoffending master, thinking labour vain, *which is undergone* for the sole purpose of discharging his debt, we hold it reasonable that he should incur punishment. So long as he performs work, his wages for that period belong to the creditor, and no other person; because those wages are pledged to that creditor: and this pledge falls under the description of a pledge to be kept. After the undertaking supposed, if the servant's master also advance him a loan on any terms, and he only perform service for a short time, so that both cannot be paid out of his wages; what is the rule of decision in that case? The apparent difficulty may be reconciled in the same manner with the case where a man renting land for cultivation from one person, contracts a debt to another, and subsequently receives a loan also from his landlord, both which debts cannot be paid from the produce of that land. Half of the grain produced both from the use of land and by corporal labour belongs to the owner of the land, half to the husbandman. In this case the husbandman's share, not yet gathered, is pledged to one person; but no act amounting to hypothecation has been done by the owner of the land: hence, the produce may be taken by the first creditor, but the landlord retains in his power the grain produced from his own land until his own demand be satisfied. Such is the practice in some instances. It cannot be asserted as a maxim, that the land must of course be left another year in his tillage, and that the debt may be paid from the produce of the following year. Since his tillage may be found defective, or he may be detected in knavery or the like, his tillage does not continue without the consent of the landlord. This, and other inferences, may be drawn from reasoning.

28.

YÁJNYAWALCYA:—An eightieth part *of the principal* is the monthly interest, when a pledge has been delivered: otherwise, it may be, in the direct order of the classes, two, three, four, or five in the hundred.

"Otherwise;" in cases other than that of a pledge delivered; that is, when no pledge has been given. Since the text has the same tenor with that of VYÁSA (27), it must be also understood that no surety was given. For a debt of one hundred *suvernas*, two *suvernas* should be paid to a *Bráhmana;* three *suvernas* to a *Cshatriya;* four *suvernas* to a *Vaisya;* five *suvernas* to a *Súdra.*

29.

MENU:—If *he have no pledge, a lender of money* may take two in the hundred by the *month,* remembering the duty of good men: for by *thus* taking two in the hundred, he becomes not a sinner for gain.

2. He may thus take, *in proportion to the risk, and* in the direct order of the classes, two in the hundred *from a priest;* three *from a*

soldier; four *from a merchant*; and five *from a mechanic or servile man*, but never more, as interest by the month.

"Of good men;" reflecting that such is the duty of good men.
CULLÚCABHATTA.

"Two in the hundred" (29, 1); this concerns a *Bráhmana*. In answer to the question, what is the rate for other tribes, he repeats the interest payable by priests, and declares *the rates for other classes* (29, 2).

"But never more" (*samam*); literally signifying, uniformly or equally; that is, neither more nor less. CULLÚCABHATTA.

But we hold, that "equally" is expressed for the purpose of showing that as a priest becomes not a sinner for gain (that is, does not contract the sinful taint arising from the *undue* receipt of money) by taking two in the hundred, so a soldier, who takes three in the hundred, is not a sinner for gain.

Thus, according to CULLÚCABHATTA, CHANDÉSWARA, BHAVADÉVA, VÁCHESPATI MISRA, and others, an eightieth part *of the principal* is the *monthly* interest, when a pledge is delivered; but two in the hundred, if there be no pledge.

The *Médhátit'hi* and GÓVINDA RÁJA expound the text of MENU (29), 'if a man in distress cannot provide for his wants on the interest first mentioned, he may take two in the hundred, or the like.' For the text of YÁJNYAWALCYA (28) solely concerns loans secured by a pledge: and there is no objection to this explanation of the word "otherwise;" in a case other than that of a man who can provide for his wants, as implied in the former part of the text; that is, where he cannot do so. Here it may be questioned, what should be the application of the text of VYÁSA (27); for a pledge is there signified by the word *ádhána*. Although the text might be well applied by anyhow explaining it "provision for wants," yet there would be no determined rate when no pledge is delivered: if the rate were the same for loans with or without a pledge, the expressions in the texts of YÁJNYAWALCYA and VYÁSA, "when a pledge has been delivered," and, "if a pledge be given," would be unmeaning. But the receipt of two in the hundred, and the like, is authorized by the *Médhátit'hi* and other commentaries, on the authority of the phrase, "he becomes not a sinner for gain" (29), which they apply to the case of utmost distress, for the purpose of obviating the doubt whether a man become a sinner by taking two in the hundred The case of absolute inability to provide for wants might exist, as well as the case of a loan unsecured by a pledge as stated by YÁJNYAWALCYA. However, this *exposition* should not be admitted, because it is disapproved by CHANDÉSWARA, VÁCHESPATI MISRA, BHAVADÉVA, and many other authors. To expatiate would be vain.

On the subject of loans without a pledge, the following text propounds a rule.

30.

HÁRITA:—For twenty-five *puránas* (*or four hundred* panas) *of copper, lent without either pledge or surety*, the interest may be eight *panas* a month; and the principal being doubled in four years and two months, bears interest no longer: such interest is legal; and the lender violates no duty by taking it.

"Being doubled;" becoming two-fold: and the interest is therefore two in the hundred by the month. "Bears interest no longer;" interest ceases: The *Retnácara.*

Interest is settled at rates varying in the order of classes, on loans made without receiving a pledge. By parity of reasoning, different rates should be also inferred, in the order of the classes, when a pledge or surety is given. As is directed by VÁCHESPATI; 'interest should also be similarly regulated, in the order of the classes, on loans secured by a pledge and the like.'

Does the order of the classes relate to the borrower or lender? CHANDÉSWARA holds, that it relates to the debtor; for he says, 'both these texts concern a *Bráhmana* contracting debts;' and again, '*he may receive interest at these rates* from a priest, a soldier, a merchant, and a mechanic *respectively*:' and this is consistent; for it is expressed in the text of MENU, "He may thus take, in the order of the classes, (from *Bráhmanas* and the rest,) two in the hundred, and so forth;" and there is no difficulty in explaining the text of VISHNU (31), "may receive from his debtor, in the direct order of all the classes, two in the hundred, and so forth."

31.

VISHNU:—But a creditor may receive interest at due rates from his debtor, or *may take from him,* in the direct order of all the classes, two, three, four, or five in the hundred by the month.

The sense of the text is as follows: "at due rates;" an eightieth part of the principal, or an eighth added to an eightieth: such a proportion he may take by way of interest. In regard to loans without pledge or surety, the Sage adds, "two, three, four, or five in the hundred, &c."

VIJNYÁNÉSWARA also holds, that the order of the classes respects the borrower. But, in VÁCHESPATI MISRA's opinion, it respects the lender: accordingly he says, "A *Vaisya* infringes no duty by taking interest at the rates prescribed in this text of MENU, and in other places; nor *do Bráhmanas* and the rest *infringe any duty,* by doing so in a season of distress." Here stating generally, that a *Vaisya* infringes no duty, he adds, "nor *Bráhmanas* and the rest, in a season of distress:" since there is no other term in that phrase to which the words can be referred, the meaning of what he says is this, "a *Vaisya*; in all circumstances, and *Bráhmanas* and the rest, in distress, infringe no duty by taking *such interest.*" What is the sense of MENU's text, consistently with this opinion? *It is as follows:* "In the direct order of the classes;" according to the order of the class to which he belongs, the lender may take, &c. We think, the order of classes should be considered as relating both to the lender and borrower, on the authority of both commentators, CHANDÉSWARA and VÁCHESPATI. Thus the contemplative Sage.(31)

32.

YÁJNYAWALCYA ordains:—All borrowers, who travel through vast forests, may pay ten, and such as traverse the ocean, twenty in the

(31) Namely, YÁJNYAWALCYA, who bears the titles of *Yógisvara*, or "the contemplative saint," and of *Yógamúrti*, or "the image of holiness."—EDITOR.

hundred, to lenders of all classes, *according to circumstances,* or whatever interest has been stipulated by them, *as the price of the risk to the lender.*

Or whatever interest has been stipulated by them, all borrowers should pay to lenders of all classes. Those who travel by difficult roads, or traverse the ocean, for the sake of commerce, should pay ten *panas*, or twenty *panas* respectively, on the hundred *panas*, if no pledge have been given. Greater interest is paid on account of the risk of losing the principal.

Śúlapáni in the *Dípacalicá.*

But, if there be a pledge or surety, the interest should not exceed the rates prescribed, for there is not such a risk of losing the principal. "Ten Panas;" the meaning is, a lender may take one part in ten.

The Sage declares an alternative in respect of the prescribed rates of two and three in the hundred, and the like: "or whatever interest has been stipulated by them."

The *Dípacalicá.*

All borrowers, *Bráhmanas* as well as others, should pay to lenders of all classes, *Bráhmanas* as well as others, whatever interest has been stipulated by them. Whether a pledge have been delivered or not, they must pay the interest, which has been promised by them in this form, "this interest shall be paid by me."

Chandéswara reads *swacrĭtám*, stipulated by the borrower himself. Bhavadéva reads *sucrĭtám*, which he explains, "allowed by all sages, namely, the eightieth part of the principal and the like." According to Chandéswara, this interest falls under the description of *cáritá*, or interest stipulated by the borrower. But according to Bhavadéva, the two cases may be reconciled by referring them to circumstances, in which a lender can or cannot *part with his money on the terms generally prescribed.* Chandéswara's interpretation should be admitted, for his reading is approved by Vijnyánéswara and Śúlapáni.

If the order of classes were referred to the borrower only, interest not varying on loans made by persons of the several classes, there would be no purpose in saying, "to lenders of all classes" (32). If it be referred to the lender only, interest not varying on debts contracted by persons of the several classes, there would be no purpose in saying, "all borrowers" (32). It should not be argued, that the expression "all borrowers," intends all, whether traversing the ocean or not, and so forth. This would be inconsistent with the mode in which the text is cited; "the Sage declares an alternative in respect to the prescribed rates of two and three in the hundred and the like." Accordingly Misra also, in his gloss on the text of Cátyáyana (56), says, "after the lapse of six months, interest should be paid by a 'Súdra at the rate of five in the hundred." Since otherwise he must contradict himself, it should be understood as the opinion of Váchespati Misra, that the order of classes relates both to the lender and borrower.

33.

Menu:—Whatever interest, or *price of the risk,* shall be settled *between the parties,* by men well acquainted with sea voyages or

journies by land, with times and with places, such interest shall have legal force.(32)

Is not this text of MENU incompatible with the text of YÁJNYAWALCYA (32)? For the text of MENU is fully explained in the *Retnácara.* "Men well acquainted with sea voyages;" mentioned merely as an instance suggesting a trader in general: "With times and with places;" who see that so much is the profit at such a place: "Legal force;" adjudication: therefore such interest should in such a case be adjudged. It is evident from the purport, since the term used in the text is explained adjudication, that the interest should be regulated according to the time, place and thing; the commentator says as much, by adding, "such interest should be adjudged:" the payment of ten and twenty in the hundred is, therefore, inconsistent with the obligation to pay the interest settled by men trafficking by sea, and the like. This should not be affirmed: the text of YÁJNYAWALCYA should be considered as applicable to the case where no specific rate of interest has been settled. VÁCHESPATI, in his gloss on the text of MENU (33), says, "they settle greater interest, expecting large profit from traversing the ocean." Alluding to this, HÁRÍTA says, some allow interest at the rate of a *pana* for a *purána.*

34.

HÁRÍTA:—Some allow a *pana* each month for one *purána, or a sixteenth of the principal.*(33)

But CHANDÉSWARA says, this text (34) concerns a borrower of a mixed class. That may be questioned; for, the text being explained by referring it to traders by sea, it is useless to extend it to borrowers of a mixed class; and no Sage has propounded a higher rate of interest payable by mixed classes.

SEC. II.—*On Special Forms of Interest.*

35.

VRÍHASPATI:—Learn, from their properties, the various sorts of interest declared to be four; or according to some, five; and according to others, six:

(32) The rate of interest on money lent to sea-faring people or on cargo, and in cases of bottomry, would of course vary, as noticed by VÁCHESPATI MISRA, with the risk and duration of the voyage: and it therefore cannot be expected that any rate could be at all fixed by legislation, to meet such cases. Among the Athenians for instance, according to XENOPHON, the fifth and third parts of the capital lent would appear to have been commonly given in bottomry, referring apparently to voyages out and home. The interest of an eighth or 12½ per cent. is mentioned by DEMOSTHENES against POLICLYTUS: it was given for money lent by the trierarch, APOLLODORUS, to the ship-captain, NAUCIPPUS, on a trireme during a passage from Sestos to Athens; but upon the condition that she should first go to Hierum to convoy vessels laden with corn, and that the principal and interest were to be paid at Athens on her safe arrival there. (BŒCKH, "Public Economy of Athens," book I, ch. xxviii, p. 135, second edition.)

According to the Roman law, in cases of bottomry, termed *fenus nauticum*, as the risk was the money-lender's, he had the option of demanding any interest he liked while the vessel on which the money was lent was at sea; but after she reached the harbour, and while she was there, no more than the usual rate of 12 per cent: on the *centisima* could be demanded. The Emperor JUSTINIAN made it the legal rate for *fenus nauticum* under all circumstances.—EDITOR.

(33) This will amount to seventy-five *per cent. per annum.* This premium must be regulated by the discretion of the parties; and it would appear to stand upon the principle of *Respondentia* or *Bottomry.* MACNAGHTEN.—EDITOR.

2. *Cáyicá,* corporal; *cálicá,* periodical; *chacravrĭddhi,* compound interest; *cáritá,* stipulated; *'sic'hávrĭddhi,* daily interest; and *bhóga-lábha,* interest by enjoyment.

3. *Cáyicá* is connected with (*cáyá*) *the* body *of a pledged animal; cálicá* is due monthly; interest upon interest is *chacravrĭddhi;* and interest stipulated by the borrower is *cáritá:*

4. When interest is received at the close of each day, it is called *'sic'-hávrĭddhi,* or hair-interest; because it grows daily, like hair, which can only cease growing on the loss of the head.

5. Thus the daily interest can only cease by the payment of the principal, and hence it is called *'sic'hávrĭddhi:* the rent *or use and occupation* of a *pledged* house, or the produce of a *pledged* field, is called *bhógalábha,* interest by enjoyment.

6. Interest payable at the close of each day, and *cáyicá,* or *interest accruing from a pledged body,* as well as interest by enjoyment, the creditor shall receive entire, so long as the principal remain unpaid:

7. *But* the use of a pledge after twice the principal has been realized from the usufruct, compound interest, and the exaction of the principal and whole interest after a part of it has been liquidated, is usury, and reprehensible.

36.

NÁREDA:—In law, interest on loans is of four kinds: *cáyicá, cálicá, cáritá,* and *chacravrĭddhi,* or interest paid on an undiminished principal, periodical interest, stipulated interest, and interest on interest.

2. Interest at the rate of one *pana* or of half *or other fraction of a pana,* repeatedly paid without diminishing the (*cáyá*) principal is named *cáyicá;* but that which runs by the month, is considered as *cálicá,* or *payable at a* (*cála*) *time certain.*

3. That interest is named *cáritá,* or stipulated, when the debtor of his own accord has agreed for it; and interest upon interest is declared to run like a wheel.

But the author of the *Mitácshará* reads a quarter of a *pana* instead of half a *pana.*

37.

CÁTYÁYANA :—Stipulated interest is that which has been specially *and freely* promised by the debtor, in a time of extreme distress, above the allowed rate;

2. And *in that case, but* in no other whatever, stipulated interest must *always* be paid.

3. Where a loan is made on an agreement that the whole use and profit of a pledge shall be the only interest, it is called *a loan on the* use of a pledge (*ádhibhóga*).

38.*

YÁJNYAWALCYA :—Interest on interest is *chacravriddhi;* monthly interest is *named cálicá;* that which is stipulated by the party himself, is *cáritá;* but *cáyicá* accrues from the body *of a pledged quadruped.*

2. A debt, secured *merely* by a written contract, shall be discharged, *from a moral and religious obligation,* only by three persons, *the debtor, his son, and his son's son;* but a pledge shall be enjoyed until actual payment of the debt *by any heir in any degree.*

39.

VYÁSA :—That interest is called *cáyicá,* which arises from (*cáyá*) the body of a *pledged* female quadruped to be milked, or a male animal to work or carry burdens.

40.

GÓTAMA :—Some hold, that no *lender should receive* interest beyond the year.

A rule, says MISRA, *abridged* from the *following* text of MENU.

41.

MENU :—Let no lender *for a month, or for two or three months, at a certain interest,* receive *such* interest beyond the year; nor any interest, which is unapproved; nor interest upon interest *by previous agreement;* nor periodical interest *exceeding in time the amount of the principal;* nor interest exacted from a debtor *as the price of the risk, when there is no public danger or distress;* nor immoderate profits from a pledge to be used by way of interest.

CULLÚCABHATTA explains "unapproved," unseen; *or he so reads the text* (*adrishtam* instead of *adishtam*).

* The text numbered 32 is again cited in this place; and the second verse of this number is again cited at 229.

42.

MENU :—Stipulated interest beyond the legal rate, and different from the *following* rule, is invalid; and the wise call it an usurious way of lending: the lender is entitled *at most* to five in the hundred.*(34)

43.

MENU :—Interest on money received at once, *not year by year, month by month, or day by day, as it ought,* must never be more than enough to double the debt, *that is, more than the amount of the principal paid at the same time.*†

44.

HÁRITA :—Some allow a *pana* each month for one *purána,* or *a sixteenth of the principal.*

2. Grain, *borrowed before the harvest,* may be doubled or at most trebled *according to its price* at the time of harvest, *being then payable by agreement;* and so may wool and cotton: *but* grass and the fibres of grass, clarified butter, salt, and raw sugar, may be increased eight-fold in one year.

45.

NÁREDA :—Of interest on loans, this is *the* universal *and highest rule;* but the rate customary in the country where the debt was contracted may be different:

2. It may be doubled, or treble, or, in another country, quadruple; so, in another, even octuple: what is usual in the country, must be paid.

To reconcile the seeming contradictions of these texts, all commentators have established various applications of them consistent with their own apprehension *of the purport of the several texts.* The subject is very intricate; and the opinions of some authors shall therefore be separately stated, to explain the sense of the texts, and elucidate the rules established.

I. According to the *Mitácshará:*

Interest at the rate of an eightieth part and so forth, if it be receivable daily, is called *cáyicá;* the same, if receivable monthly, is named *cálicá;* this is declared by the commentator: and this interest, being received every

* Before this text, the compiler again cites the text numbered 33. A different construction is put upon the text by commentators. See the exposition numbered V.

(34) This means five in the hundred by the month,—and the rule is referred to in the text immediately following.—EDITOR.

† The remainder of this verse is cited in a subsequent Section (V. 61). The first part of the following text has been already cited (34).

month, is therefore *named cálicá ;* the same interest divided by the number of days *in a month,* and receivable daily, is *cáyicá :* but *cáritá* signifies interest receivable only at the time voluntarily stipulated by the borrower. *Chacravriddhi* is obvious.

On this interpretation, the texts of GÓTAMA and MENU regard interest named *cáritá.* An agreement for interest should not be made, *even* by the desire of the borrower, for a period exceeding one year. Interest therefore should be paid by the year, as the longest period *for which it ought to be forborne ; it should* not *be* made *payable* at the end of thirteen months. Hence he has said, "by the day, by the month, or by the year." Otherwise (unless it be paid by the year, which is the *period* mentioned) it would be difficult to obtain that interest *when long forborne.* In this case also, legal interest only should be taken. The Sage declares it: "nor any interest which is unapproved ;" which is not propounded in codes of law ; or (on the other reading) which is not seen in codes of law. We infer, that the four sorts of legal interest, and no other, should be taken.

If interest have been received for a few months, and subsequent interest have remained unpaid, by reason of the debtor's indigence, even to the tenth or twelfth year, the principal is only doubled. The creditor may take his principal and an equal sum as interest (43).

"Received at once (43) ;" another reading has *sacridáhitá,* lent once. Money so lent can only be doubled ; but recovered from one person, and lent to another, it may be more than doubled. On the first reading, *sacridáhritá,* received at once, the text should be thus expounded : "*interest on money,* received by degrees, day by day, month by month, or year by year, may more than double the principal."

The *cáyicá,* or corporal interest, mentioned by VYÁSA, and interest by enjoyment and hair-interest, explained by VRIHASPATI, are exclusive of these. Hair-interest occurs where money is borrowed on a promise in this form : "I will pay twenty shells every day, as interest, until the debt be discharged ; *on these terms* lend me one silver coin" (35, 4). The *cáyicá* of VYÁSA (39) is the usufruct of a slave or the like, when no specific agreement is made that the use and profit of the pledge shall be the only interest. Interest by enjoyment is the use or occupation of a pledged house or the like ; and is mentioned by CÁTYÁYANA (37, 3) under the name of *ádhibhóga* or *use of a pledge.* These may be received entire, so long as the principal remain unpaid (36, 6). Or the *cáyicá* of NÁREDA (36, 2) and *śic'hávriddhi* of VRIHASPATI (35, 4 & 5), *that is, daily interest,* may certainly be received entire, under the authority of the law, so long as the principal remain unpaid : but not interest named *cálicá* and the rest ; for no law *expressly authorizes it.* Compound interest is immoral ; and so is the use or profit of a pledged house or slave or the like, after receiving twice the amount of the principal (35, 7). But, we think, neither hair-interest *received daily* nor interest received monthly or annually, is illegal, *though* it have amounted to a sum exceeding the principal.

To this an objection is made : if interest which is payable daily cannot, through the indigence of the debtor, be recovered each day ; still, whenever the debt shall be discharged, that interest must be paid with the whole arrears of the account, however great the sum may be. This should be affirmed ; else the mention of hair-interest in the text (35, 7) is unmeaning. But there is a consequent inconsistency with general practice ; for in some countries it is the practice, that hair-interest should be received

to the *last* day of the stipulated period; *but*, if *the principal* happen to remain unliquidated after that period, such interest only as is settled by five persons, *acting as arbitrators*, is received from that date. In other countries, hair-interest is only received for a few days as determined by five persons *acting as arbitrators*; and beyond that time, such interest as is settled by them.

This *seeming contradiction* may be reconciled from the text of NÁREDA; "but the rate customary in the country, where the debt was contracted, may be different" (45, 1). However, another objection is started: if stipulated interest can only be received at legal rates, it contradicts the texts of CÁTYÁYANA (37, 1); for he describes stipulated interest as exceeding the allowed rate. It is answered, the prohibition against receiving any interest, which is unapproved, does not denote it *legally* irrecoverable, but immoral. If, therefore, a man require stipulated interest above the rate allowed by the law, he can recover it, but is guilty of a moral offence. This is evident from the text of VRĬHASPATI; "and the exaction of the principal and interest after a part of it has been liquidated is reprehensible" (35, 7). YÁJNYAWALCYA also declares, "all borrowers may pay whatever interest has been stipulated by them" (32). On this exposition, the interest payable by those who travel through vast forests, as specified by YÁJNYAWALCYA (32) is legal; for the text is cited with this observation, "the Sage declares an alternative in respect of interest varying according to the *class of the* receiver;" that is, the receiver of the loan. But, in fact, it is proper to consider this as descriptive of stipulated interest, for it has the same import with the text of MENU (33). However, such stipulated interest is legal, because it is authorized by an express law; but the text of VRĬHASPATI (35, 7) intends other borrowers than such as traverse the ocean and the like.

It should not be argued, that the text of MENU has a different purport, coinciding with part of the text of YÁJNYAWALCYA, "or whatever interest has been stipulated by them" (32). That would be inconsistent with the interpretation of this text, "all borrowers, *Bráhmanas* as well as others, should pay, to lenders of all classes, whatever interest has been stipulated and promised by them." But if it be expounded, "all borrowers, whether trafficking by sea or not," then it may be made to coincide with the text of MENU.

Here it should be observed, that the author of the *Mitácshará* supplies the reason for the rate of ten in the hundred and the like, payable by those who travel through vast forests and the rest, "because there is risk of losing even the principal lent." It is therefore indicated, that on loans secured by a pledge or the like, where no risk of losing the principal is incurred, the eightieth part only should be taken.

The text of YÁJNYAWALCYA on compound interest and the rest (38, 1) is not approved in the *Mitácshará*. According to the opinion delivered in that work, the receipt of interest named *cálicá* and the rest, even beyond the year, is not forbidden.

II. According to CHANDÉSWARA:

"Interest beyond the year" (41) signifies interest exceeding the year. If a money-lender, apprehending that the sum lent would be repaid by the borrower in very few days, bargain for specific interest, it shall only be extended to the close of the year, not fixed for a period exceeding that *space of time.* CHANDÉSWARA.

The meaning suggested by the gloss is this : a borrower asks a loan of a moneyed man ; but he conjectures, from the borrower's purposes, that it will be early repaid : he therefore says, "if you will undertake to pay interest for six months, I will lend the money ;" and the borrower, agreeing to this condition, accepts the loan. In such a case as this, a lender may require a stipulated period of six months, ten months, or one year ; but not a greater time.

In like manner, some person, whose capital is small, practises money-lending, because he is unable to provide for his wants by other modes—A man, needing a loan, said to him, "Lend me money :" the money-lender rejoined, "When wilt thou repay it?" The borrower told him, "My brother is gone to the royal residence ; when he returns, two or three months hence, I will repay you." The money-lender considered, "he will repay it early, and my gain will be small; why should I trust my property in the hands of another for so small a gain? If he will promise to pay interest during a long period, then only should the money be lent." Accordingly he told the borrower, "if thou wilt pay interest during a longer period, I will advance the loan." The borrower acquiescing in this proposal, the lender added, "if thou shouldst repay the loan within the year, at the end of six or seven months, or at any time before the close of the year, I must receive the amount of interest for a whole year." So saying, he advanced the loan ; and the borrower, agreeing to those terms, contracted the debt : and interest computed for a whole year was paid, whether he discharged the debt within the year or at the close of the year. In such a case as this, a lender should not require a stipulation for interest one day beyond the year. But if the borrower cannot discharge the debt even at the expiration of the year, then indeed legal interest may be received beyond the year.

"Nor any interest which is unapproved :" let no lender receive compound interest, nor interest for stated times, nor stipulated interest, nor corporal interest, in modes, *or at rates*, unauthorized by the law. Consequently he should only receive periodical interest, and the rest, in legal modes ; that is, at the rate of an eightieth part of the principal, and so forth.

Does not *cárità* signify interest specially and freely promised by the debtor? How then is it regulated by legal rates ? *It is regulated* by the texts of MENU (33) and HÁRITA (34 and 44).

The text of MENU is thus expounded : "men well acquainted with sea voyages" are mentioned merely as an instance suggesting a trader in general. "With times and with places," who see that so much is the profit on such articles at such a place. That interest which such traders settle when borrowing money, has legal force, and should be adjudged.

The first text of HÁRITA (34) is applied by CHANDÉSWARA to borrowers of a mixed class. "Grain may be doubled at the time of harvest" (44, 2); grain is doubled at the time when new grain is gathered, even two or three months after the loan. If it be not then paid, it can only be trebled, and bears no further interest. "And so may wool and cotton;" wool, that is, the hair of sheep and the like, and cotton also, bear the same interest as grain. "But the fibres of grass, &c." on the fibres of the *vírana* and the like, and on grass and the like, the interest is eightfold for one year. Such is the gloss on the text of HÁRITA ; and the meaning is, that this text does not concern the limits of interest.

Is not this unreasonable ? Grain must be repaid two-fold at the time of harvest ; that is, when new grain is gathered. If grain, therefore, be borrowed

in the month of *Ashádha*, *Jyaishthi*, or the like, it must be repaid two-fold in *Bhádra* or *Pausha*.(35) It is, consequently, a great disparity, that the same interest should be received in seven or eight months, which would be due in fifty months *at the prescribed rate of two in the hundred.* Aware of this question, CHANDÉSWARA cites the text of NÁREDA (45), and thus expounds it: " this rate of interest, an eightieth part of the principal, and so forth, is universal, because it is authorized by the law." In some countries, corn is repaid with an advance of a quarter; in others, with an advance of half *the quantity lent:* these rates are also comprehended in *the text* (45, 2); for twice, and three times as much, and so forth, are mere examples. Consequently on salt, clarified butter, and the rest, interest should be taken at the rate settled by the immemorial custom of the country.

But interest at ten or twenty in the hundred, payable by those who travel through vast forests, or traverse the ocean, is not stipulated interest (*cáritá*); for CHANDÉSWARA says, payment of it may be enforced, whether it have been stipulated or not. In fact, so much interest as is specially promised by the debtor, is stipulated interest, not confined to the rate of an eightieth, and so forth. That stipulated interest also is allowed by the law, for YÁJNYAWALCYA declares, " borrowers may pay whatever interest has been stipulated by them" (33); and CÁTYÁYANA says, " stipulated interest is that which has been specially promised by the debtor" (37): This interest is legal, if it were promised in a time of

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(35) As frequent mention is made in the present work, of Indian months, it may not be out of place, it is thought, to append a brief account of them.

The names of the Indian months are derived from twelve of the asterisms, in the usual form of patronymics; for, the *Pauranics* (poetical fabulists) who reduce all nature to a system of emblematical mythology, suppose a celestial nymph to preside over each of the constellations, and feign that the god SÓMA or LUNUS, having wedded twelve of them, became the father of twelve genii or months, who are named after their several mothers; but the *jyotishicás* (mathematical astronomers) give a different account of the matter; they say, that when the lunar year was arranged by former astronomers, the moon was at the full in each month of the year, on the very day when it entered the *nakchatra*, from which that month is denominated. The names of the months, together with their corresponding English ones, and their respective zodiacal signs, are given below:—

INDIAN MONTHS.	ENGLISH MONTHS.	ZODIACAL SIGNS.
1. *Chaitra*	March—April.	*Tula*, or *Libra*. In some parts of India, the *Rabi* or spring crops are produced in this month.
2. *Vaisákha*,	April—May.	*Vrischika*, or *Scorpio*.
3. *Jyeshtha*,	May—June.	*Dhanus*, or *Sagittarius*.
4. *Asádha*,	June—July.	*Makara*, (a sea monster) *Capricornus*,

This month is considered to be the first of the rainy season and beginning of the rice cultivation.

5. *Srávana*,	July—August.	*Kumbha*, or *Aquarius*.
6. *Bhádrapada*,	August—September.	*Mina*, or *Pisces*.
7. *Asvin* or *Asviyuja*,	September—October.	*Meshá*, or *Aries*.
8. *Kártika*,	October—November.	*Vrishá*, or *Taurus*.
9. *Márgasira*,	November—December.	*Mithuna*, or *Gemini*.
10. *Pausha* or *Pushya*,	December—January.	*Karkáta*, or *Cancer*.
11. *Mágha*,	January—February.	*Sinha*, or *Leo*.
12. *Phálguna*,	February—March.	*Kanya*, or *Virgo*.

As twelve lunations form a lunar year, it requires only about 354 solar days to complete this period. To adjust the lunar time which falls behind by eleven days the solar year of 365 days, an intercalary month, called *Adhika* is inserted, and the month to which the last day of the moon's change belongs, is named twice over,—as, *Adhika Vaisákha*. For further information as to the computation of time among the Hindus, the reader is referred to SIR WILLIAM JONES' " Essay on the Indian Zodiack" Works, vol. V, p. 71. COLEBROOKE, " Miscellaneous Essays," vol. II, Essays XIV and XV, p. 321, &c. DAVIS, in the " Asiatic Researches" vol. II, p. 225, &c., and other authorities.—EDITOR.

extreme distress; but, promised by compulsion, without such distress, it is not legal—for CÁTYÁYANA adds, "and in no other case whatever must stipulated interest be paid." Even though stipulated in a time of extreme distress, *on a loan renewed*, it is not legal, if payment could have been obtained; for VRĬHASPATI declares, "the exaction of the principal and interest, after a part of it has been liquidated, is usury, and reprehensible" (34, 7).

Cáyicá is of two sorts; *one* arising from the body of a *pledged* female animal to be milked, or a male animal to work or carry burdens, as described by VYÁSA (39); *the other* explained by NÁREDA, interest repeatedly paid without diminishing the principal (36). The use and profit of a cow or the like to be milked, or of a boat or the like, where no such agreement has been *expressly* made, as described by CÁTYÁYANA (37, 3) is the *cáyicá* of VYÁSA; and it should be taken at the rate of an eightieth part *by the month*, under the restriction of the text, "nor any interest which is unapproved" (41).

CHANDÉSWARA says, a cow or the like to be milked, or an ox or the like to work or carry burdens, are instances mentioned generally; for the use of boats or the like, not expressly pledged, must otherwise be excluded *from that definition of* cáyicá. When there is such an express agreement as described by CÁTYÁYANA, the use of the pledge is *ádhibhóga*, the same with *bhógalábha*, propounded by VRĬHASPATI. In this case no reference is made to the rate of an eightieth part, for no text specially directs it: the whole use and profit of the pledge *shall be the interest;* for such is the import of the text. These two kinds of interest are consequently distinct, but should be admitted as has been stated.

The *cáyicá* of NÁREDA is thus explained: "interest to be repeatedly paid without diminishing the body (*cáyá*) of the principal sum, at the rate of a *pana*, or half or other fraction of a *pana*, as agreed by both parties, is named *cáyicá* accroding to NÁREDA." CHANDÉSWARA.

For instance; a borrower, coming to a moneyed man, asks a loan; in reply, he asks, "when wilt thou repay it?" the borrower rejoins, "I will repay it at the end of a month:" a loan is accordingly concluded to mutual satisfaction. Afterwards, at the close of the month, the creditor demands payment; but the debtor, unable to discharge the debt, answers evasively, "I will pay you at the end of a fortnight:" the creditor repeatedly urges payment; and the debtor, in order to satisfy him, promises some additional interest, such as a *pana* (*or the like*). That additional interest, which he thus promises from time to time, being repeatedly settled between the parties day after day, is the *cáyicá* of NÁREDA; it is not the stipulated interest named *cáritá*, for that commences from the date of the loan. On this account it is separately mentioned by NÁREDA.

"Without diminishing the principal;" in the case of interest payable at stated times (*cálicá*) and the like, if more than an eightieth part or the like have been paid for interest, whatever appears, on computing the account at the time of discharging the debt, to have been overpaid, by so much is the principal, which was receivable by the creditor, diminished. But, in this case, what he receives from time to time, above the rate of an eightieth part, does not reduce the principal sum. It is not proper to say, that the interest should only be received at legal rates, because this (*cáyicá*) is in its own nature a breach of the law. Were it so, *still* the text, prohibiting any

interest which is unapproved (41), concerns only the *cáyicá* of VYÁSA, not this (*cáyicá*) : this form of interest is only mentioned by CHANDÉSWARA incidentally. The word (*sáswat*) "repeatedly" signifies again and again; for it is so explained by AMERA. (Chapter XVII, on Indeclinable Words.)

That interest which is received month after month, at the rate of an eightieth part *of the principal*, is considered as *cálicá*. Here month is a mere instance: that interest, therefore, which is received by the year, is also considered as *cálicá ;* and so is that which is payable at the end of six months, or the like. Accordingly MENU, in the text cited (41), mentions interest for time generally.

"Interest upon interest :" when a debtor, unable to pay the whole amount of interest, promises to pay it with interest ; the interest, which is so promised, is wheel-interest. CHANDÉSWARA.

More will be said on this subject in the section on Recovery of Debts : but even interest upon interest a man should only take at the legal rate of an eightieth part and so forth.

When the borrower, at the time of receiving the loan, makes an agreement in this form, "I will pay twenty shells a day," and the loan is made on those terms ; in that case, such interest is hair-interest, as described by VRĬHASPATI (35, 4) Interest by enjoyment (*bhógalábha*) has been already explained in the gloss on *cáyicá*.

Cáyicá, hair-interest, and interest by enjoyment, shall be paid *entire*, so long as the principal remain unpaid. If the payment of interest have been discontinued a few days after *the loan*, and the debtor be only able to pay the debt ten or fifteen years afterwards, twice the amount of the principal only shall, *in general*, be received by the creditor, in lieu of other interest (43) : but it is not so in the present case. On the contrary, hair-interest shall be received on a calculation of the daily amount *forborne*. *Cáyicá*, or interest accruing from a pledged body, shall be received on a computation of an eightieth part of the principal monthly, until the principal be liquidated : if the thing to be used be destroyed by the act of GOD, another chattel must be delivered in its stead ; or, if that cannot be, interest must be made good otherwise. Interest by enjoyment continues so long as the thing *pledged* remains with him who has the use and profit of it : if the pledge be destroyed by the act of GOD, the debtor shall be compelled to deliver another pledge, under the authority of a text which will be quoted in the chapter on Pledges. The creditor should receive a fresh pledge ; or, if that cannot be, the price of the usufruct *forborne* should be paid when the principal is liquidated. These rules are grounded on a text of VRĬHASPATI (35, 6), and on one of YÁJNYAWALCYA (38, 2).

What sort of interest is suggested by the texts, "let no lender receive interest beyond the year," (40 and 41)? It is said, "such interest is a species of stipulated interest (*cáritá*)." Here it should be noticed, that the legal amount of interest, whether received at the time when the debt is discharged, or earlier, or both (*partly at one time, and partly at another*), only equals the principal sum. If stipulated interest, *cáyicá*, hair-interest, or interest by enjoyment, when added to the principal, more than double it, they are not legal *in a moral view*. By receiving such interest, *Bráhmanas* and others, and even *Vaisyas*, commit a sin ; but if a creditor insist on obtaining it, the king shall enforce payment : VRĬHASPATI declares as much (35, 7). The use and profit of a pledge, or the use of a chattel in that

form of interest which is named *cáyicá*, after twice the amount of the principal has been obtained from the usufruct; interest upon interest; and, the exaction of principal and interest, that is, of the principal with the whole interest, after a small part or the whole of the interest has been received, either as stipulated or monthly interest, is usury reprehensible in a man who subsists by money-lending. The meaning of the text is, that such usury produces the consequence of sin; not that the king shall not enforce payment of it.

"Stipulated interest beyond the legal rate, &c." (42); *this text of* MENU *is otherwise* expounded by CHANDÉSWARA: "interest exceeding the rate stipulated *by the debtor*, and different *from the rates prescribed by the law*, is invalid: for Sages have declared the *legal* way of money-lending." The *legal* way of money-lending is *founded on* this: interest allowed by the law, or stipulated by the debtor, is valid, not any other interest. But if the lender, through covetousnéss, require greater intetest, and the borrower, apprehensive of not finding any other lender, be willing to pay *higher interest*, in that case the rule is this; "the lender is entitled *at most* to five in the hundred" (42). "From a *Bráhmana*" should be supplied; for the rule would be superfluous if it were referred to a *Súdra*. The author of the *Mitácshará seems to have* entertained the same opinion; for he has not particularly remarked *on the text*. On this interpretation also, the payment of hair-interest and *cáyicá*, so long as the principal remain unpaid, is conformable to the text of NÁREDA (45). CHANDÉSWARA'S opinion may be thus briefly stated.

III. According to VÁCHESPATI MISRA:

On his explanation, *cáyicá* and the rest also vary from the legal rate of an eightieth part *by the month*; for he cites the texts of VRÍHASPATI in reply to the question, What other kinds of interest are there? and how many sorts *of interest?* If interest at the eightieth part *of the principal*, as already mentioned by MISRA, were distributed by VRÍHASPATI into monthly and annual interest, and so forth, the citation introduced by the question, "what other kinds of interest are there?" would be irrelevant.

When this question is put, "What other kinds of interest are there?" the answer is, hair-interest, and interest by enjoyment. "How many sorts?" the *answer is*, legal interest, as *cálicá* and the rest; and interest not prescribed by the law, as *cáritá* and the rest. But the exposition would be imperfect, since the receipt even of legal interest, as *cálicá* and the rest, beyond the year, is forbidden; and the omission of highest *limited* interest would be derogatory *to the Sage*.

Subdividing into four sorts interest at the rate of an eightieth, and so forth, as in the exposition of CHANDÉSWARA; and adding them to other kinds of interest, namely hair-interest, and interest by enjoyment; *there result the kinds of interest* specified by VRÍHASPATI. Thus hair-interest, and interest by enjoyment, are stated in answer to the question, what other kinds of interest are there? And *cáyicá*, and other subdivisions *of the general rate*, are stated in answer to the question, how many sorts there are? This again is erroneous; for, had such been the meaning, the question, how many sorts? should have been first put. To expatiate would be vain.

On this interpretation, the *cáyicá* of VYÁSA, arising from the profit of a slave's labour or the like, falls under the description of interest by enjoyment; but the *cáyicá* of NÁREDA must be considered as one of the subdivi-

sions *of the general rate.* For MISRA says, the *cáyicá* of VYÁSA falls under the description of interest by enjoyment; but the *cáyicá* of NÁREDA is distinct from these: and the *cáyicá* of VYÁSA is not mentioned in the following exposition: "*cáyicá*, is interest by the year; *cálicá*, by the month; *chacra-vriddhi*, interest upon interest; *cáritá*, interest specially promised in a time of extreme distress; *'sic'hávriddhi*, interest payable daily; *bhógalábha*, the use and profit of a slave's *labour* and the like."

The use of distinguishing the *cáyicá* of VYÁSA from interest by enjoyment, will be hereafter explained. But the *cáyicá* of NÁREDA is interest payable by the year, considering the word *s'as'wat*, repeatedly, as signifying annually. This is paid without diminishing the principal; even though received for a thousand years, it does not reduce the principal. If the interest happen to be forborne after *the first* few days, the whole arrears of interest must be paid when the debt is discharged; for, according to MISRA's opinion, this kind of interest is intended by the word *cáyicá* in the text of VRĬHASPATI (35, 6): and this has been stated by MISRA, on the authority of HELÁYUDHA.

But if the expression of MISRA, "to be paid by the day," be authentick, the meaning must be, that the sum calculated on daily interest shall be paid yearly. Else it is inconsistent with his exposition, "*cáyicá* is interest by the year." The special rule adopted by him, that *cáyicá* and the rest must be received at the rate of an eightieth part, is not suggested by the law; but hair-interest, which is receivable daily, is founded on a text of VRĬHASPATI (35, 4).

"*'Adhibhóga*, or a loan on the use of a pledge" (37, 3); where an agreement is made, that the whole use of the thing shall be the only interest, it constitutes *a loan on the* use of a pledge. MISRA.

It is, consequently, intimated, that the word "pledge," *in* the first *part of the text,* is indeterminate; for by such an exposition *cáyicá* is of two sorts, *one of which corresponds with* àdhibhóga. It follows, that the various sorts of interest are seven. Of these the *cáyicá* of VYÁSA, *cálicá*, stipulated interest, and interest upon interest, should not be received beyond the year. For the sake of this distinction, VYÁSA has stated *cáyicá* separately *from* àdhibhóga, *to which it is otherwise similar.* *Cáyicá* is the use *and profit* of *the* bodies *of quadrupeds*, as oxen, horses, and the like. Or the repetition of the word "pledge," in the text of CÁTYÁYANA, has a determinate use; consequently, it should be understood, as in the gloss of CHANDÉSWARA, that *àdhibhóga* takes place when there is an agreement in regard to the pledge; otherwise the usufruct is *cáyicá*.

Such interest may be taken even beyond the year, on a fresh agreement. The authority for this is the text of GÓTAMA (40): and the sense of the text is this; of the sorts of interest enumerated, interest upon interest, and the rest, no lender should take the fourth sort beyond the year; nor any interest which is not again declared or promised, beyond the year; that is, neither of the other three *without a fresh agreement.* The rule respecting the *cáyicá* of NÁREDA has been already delivered. It is the same in respect of the other two; at the time of discharging the debt, they should be received in their own kind, or by their value.

A debt secured *merely* by a written contract (38, 2) shall be discharged by three persons, the debtor, his son, and his son's son; but in the case of a loan on the use of a pledge, the debt must be discharged even

by a great-grandson.(36) Yet if the agreement were in this form, "I will relinquish the pledge when twice the amount of the principal has been realized," in that case the creditor must relinquish the pledge whenever he has realized double the amount of the principal.

46.

YÁJNYAWALCYA:—But when a pledge has been given, *which the creditor promised to return on the debt being doubled,* then surely, the interest having equalled the principal, the pledge must be released on the double sum being paid, or having been received from the use of the pledge.

47.

VISHNU:—Even if the highest interest, *or that equal to the principal sum,* have accrued, the creditor shall not *be forced to* restore a pledge fixed *in his hands* unless there have been a special agreement.

This distinction is also noticed by CHANDÉSWARA, and should be admitted by others. But that is not the import of the text, "a pledge shall be enjoyed until actual payment of the debt" (38, 2). The text of VRĬHASPATI (35, 7) has been explained. His former text on interest by enjoyment (35, 5) furnishes an instance only of such interest; for it coincides with the text of CÁTYÁYANA (37, 3). It is thus expounded by MISRA: "Rent" signifies hire, use, or occupation of a pledged house: "Produce" (*'sadas*) signifies grain or other fruit of a pledged field, agreeably to the sense of the verb *sad*, cut down or reap.

Here boats and the like are also suggested by the word "house," taken as a general instance: and "rent," or use, also suggests transport of merchandize, and the like.

In a gloss on the text of MENU (43), MISRA thus expounds it: "If gems, *money*, or the like, be received at once, double the amount of the principal only should be taken; but if they be not received at once, more may be taken." Consequently here, as before, if interest have anyhow remained unpaid after the first few days, the principal is only doubled, however long the period *of forbearance* may be, and no more *should be received*.

The text, allowing a *pana* each month for a *purána* (34), and that which confirms interest settled by men well acquainted with sea-voyages (33), concern stipulated interest only. But these rules subsist where the price is great at the time when the debt is contracted; or where the value of a thing bought with money borrowed for the purposes of trade, and sold in another country, is improved. The text of HÁRÍTA (44, 2) declares legal interest on particular articles. It is proper to consider the text of YÁJNYAWALCYA (32) as solely relating to such interest. This and other inferences may be drawn from reasoning.

(36) The legal responsibility of the son to discharge his father's debts is discussed at some length in Book I, Chapter V, "On the payment of debts."—EDITOR.

In this exposition BHAVADÉVA concurs; but HELÁYUDHA reads the text of NÁREDA (36, 2), *panaváhyá* instead of *panárdhádyá*, and explains the text, "interest to be borne (*váhaniyá*) or received by the creditor, repeatedly, even for a thousand years, if the (*pana*) principal sum remain *due*, without any diminution of (*cáyá*) the principal, is called *cáyicá*." On this general consideration it is said by MISRA, that *cáyicá* must be paid so long as the principal remain unliquidated. But CHANDÉSWARA rejects this reading, because it has been unnoticed by most authors.

"Let no lender receive interest beyond the year" (40) and (41): if a creditor is desirous of receiving interest in such a manner that interest may not cease on *its equalling* the debt, he should receive his interest before the close of the year, not after the year has expired. The meaning, therefore, on this interpretation is, that he should receive the interest then only when the debt is discharged, or the highest limited interest due for the time *the loan has remained unpaid*. But if the creditor, through want of confidence in his debtor, or from his own inability to provide for his wants *otherwise*, wishes to receive interest within the year, in that case he may receive it before the close of the year; that is, he may receive the interest for twelve months, month by month. But after a year, the debt is only doubled by remaining undischarged during fifty months; before the expiration of that period, interest is payable on the terms of the loan. Consequently, *cáyicá*, if it can be recovered, may be taken beyond the year, when there is a promise in this form, "I will pay it *regularly* until the debt be discharged;" and so may *cálicá*, if there be a promise of paying it month by month. But if the creditor cannot obtain regular payment, the principal is doubled in *due* time.

Cáritá is described by CÁTYÁYANA (37, 1), and noticed by MENU (33). By the rule, "nor any interest which is unapproved" (41), *it is directed* to take even *cáyicá*, and the rest, only at the rate of an eightieth part, and so forth. But if there be an agreement in this form, "I will pay it daily," it is hair-interest. Other interest must be regulated in the mode abovementioned.

IV. According to 'SÚLAPÁNI in the *Dípacalicá*.

On the text of YÁJNYAWALCYA (38, 1) it is remarked in his work, "this verse is not found in some copies." Interest is of six sorts under the text of VRĬHASPATI (35, 2). There *cáyicá* is interest which arises from the labour or use of an animal to carry burdens, or of a female quadruped to be milked; *cálicá* is interest which is payable by the month; interest upon interest is *chacravrĭddhi;* interest *specially and freely* promised by the debtor himself is *cáritá;* that which is received daily is *'sic'hávrĭddhi;* and the profit arising from the use of a pledge is *bhoga.* Among these, *'sic'hávrĭddhi*, *cáyicá*, and interest by enjoyment, may be received until the principal be discharged (35, 6).

This notion is intimated: according to YÁJNYAWALCYA, interest by enjoyment is comprehended under corporal interest (*cáyicá*); and the *cáyicá* of NÁREDA, as expounded by CHANDÉSWARA, falls under the description of stipulated interest (*cáritá*): as expounded by MISRA, it falls under the description of interest payable at a time certain (*cálicá*); for the word "month" is a mere instance of a general sense. *'Sic'hávrĭddhi* is only a distinct form of stipulated interest; but so long as the principal remain unliquidated, this interest must be paid to fulfil the terms of the agreement. But if

there be no promise of paying it daily so long as the principal remain undischarged, it is not hair-interest. If an agreement that interest at the rate of four *panas*, or the like, shall be paid every fifth day so long as the principal remain undischarged, that also should, it seems, be paid until the principal be liquidated; but such a contract ought not to be made, because it is not authorized by the law.

The text of MENU (41) must be explained as in the gloss of HELÁYUDHA; but other texts must be understood in the mode already stated. In the text of YÁJNYAWALCYA (32), greater interest is allowed on account of the risk of losing the principal: it is therefore legal in this *author's* opinion. With this exception, the text of VRĬHASPATI (35, 7) is applicable to all cases. The sage declares an alternative in regard to the prescribed rates of two and three in the hundred, and the like, "or whatever interest has been stipulated by them" (32.) This consequently intends stipulated interest and the like; and the text, beginning with the words "interest, upon interest" (38, 1), only recapitulates those sorts of interest.

V. According to CULLÚCABHATTA:

"Let no lender receive interest beyond the year" (41): if a creditor, having contracted for interest payable at stated times (*cálicá*), or the like, but finding it troublesome to receive interest monthly, tell the debtor, "thou shalt pay the interest of several months at once;" still he should receive it within the year. For example: interest for six months, for ten months, or for one year, may be paid at once; not interest for thirteen, fourteen, or fifteen months. The meaning is this: if he do not receive interest before the close of the year, in that case, since its periodical payments are interrupted, and it can *now* only be received when the debt is discharged, interest can on no account be more than sufficient to double the debt, as is declared by MENU (43) It is implied, that interest receivable day by day, month by month, or the like, may be taken to a greater amount than is sufficient to double the debt, provided the principal remained unpaid. Such is the gloss of CULLÚCABHATTA.

Here interest receivable day by day is the *cáyicá* of NÁREDA; for the word *s'as'wat*, "repeatedly," in that text (36), bears the sense of "daily." The same interest is described by VRĬHASPATI, under the name of hair-interest (35, 4). Not considering the *cáyicá* of VYÁSA and profit by enjoyment *of a pledge* (*bhógalábha*) as interest, it is stated that the various sorts of interest are four. But if these be acknowledged to be sorts of interest, there are five or six kinds.

In the text of MENU (41) the reading is *adrĭshtam*, unseen: let no lender receive any interest unseen in codes of law, or unknown *to the law*. This prohibition is intended to show the immorality *of receiving such interest*, not to ordain that a lender shall not obtain it, if he wish to receive *such interest*. Consequently, stipulated interest, and the like, which have been previously settled, only produce a taint of sin in the lender who receives them, not an incapacity to recover them. What are those *usurious* forms of interest? *In answer to this question*, the Sage adds, "interest upon interest, &c." VRĬHASPATI propounds their nature *in a text above cited* (35, 3).

Interest upon interest is, in its own nature, reprehensible; interest for a time certain, when more interest is *received* than is sufficient to double the

principal; corporal interest (*cáyicá*), when the animal is too much worked or milked; stipulated interest, even though it have been settled by the debtor in a time of extreme distress, and by the creditor through kindness. These four illegal sorts of interest should not be received: VRĬHASPATI expressly forbids it (35, 7). CULLÚCABHATTA.

Here the *cáyicá* of NÁREDA must also be comprehended under the term *cáyicá*. Hence the receipt of that also is shown immoral. How is it immoral, if the debt be discharged within the fourth or fifth month; for, in that case, more interest than is sufficient to double the principal is not received? *This objection is* not *well founded;* for those kinds of interest are reprehensible, from their intrinsic evil. On this opinion also, a creditor, who advanced a loan, should only receive twice the amount of the principal, after the time when the principal is duly doubled, and not at any time before that period. But if the debt be discharged before the time when it would regularly be doubled, in that case the principal, with *legal* interest only, should be then received. Thus *Bráhmanas* and the rest violate no duty. Within that period, whatever interest is received at any stated times, is *cálicá;* for the word "month" is *merely* an instance *stated generally* in the texts of NÁREDA and others (36, 2). Accordingly MENU mentions periodical interest generally (41).

The text *subsequently cited* (42) is applicable to the case of interest due without a special agreement. That will be explained under its proper head. The text, "whatever interest shall be settled by men well acquainted with sea voyages, &c." (33), is expounded as above stated.

How can it be said that stipulated interest (*cáritá*) is unauthorized by the law, since *cáritá* is described in the code of CÁTYÁYANA, "interest which has been specially *and freely* promised by the debtor in a time of extreme distress" (37)? Nor should it be argued, that it is unauthorized by the law, not being suggested in the *Véda.* The text of CÁTYÁYANA may also be considered as *a portion of* the *Véda;* else the highest *limited* interest, such as interest doubling the debt and the like, would also be unauthorized by the law. To this it is answered, the law expresses generally, that a *Vaisya* and others may subsist by money lending: in answer to the question, how much profit ought to be taken *by a money lender?* the texts of MENU and the rest are adduced, or the scriptural law to be established through them: a lender may receive, on a loan, the eightieth part *of the principal and so forth,* in the order of classes, as prescribed; or he may take, as the highest interest, if the debt have been long outstanding, a sum equal to the principal, for the interest accumulated at such rates: this, and other *legal interest, a lender may receive.* Interest so authorized is alone received in practice as legal interest. It is the rule for delivery *by the creditor;* for it is taught by the law, which suggests a mode of subsistence by the delivery of loans. But if a borrower stipulate greater interest through the urgency of his wants, then, in answer to the question, what should be done at the time of payment? a rule may be deduced from the text of CÁTYÁYANA (37, 1), the debtor must pay the interest which he has promised. Such interest, although it be so authorized, is not prescribed to the lender by codes of law: hence the delivery of interest, which has been promised *by the debtor,* is a rule for receipt,* a *subordinate* title of judicial procedure under the head of Loans delivered. But, in fact, interest allowed by the law is legal interest; and interest settled by the will of

* See the gloss on the text of NÁREDA (1).

men is not received in practice as legal interest; for the meaning of "legal" is, "allowed by the law." Hence, where a creditor, from the circumstances of the time or the like, accepts of less than legal interest, since less interest must in that case be admitted, there is no objection to the law of stipulated interest, as it concerns the lender *as well as the borrower*. Such is CULLÚCABHATTA's opinion.

VI. *According to other Commentators:*

But others consider the text of YÁJNYAWALCYA (32) as intended to authorize the receipt of ten or twenty in the hundred from those who travel through forests or traverse the ocean, although *specifick* interest have not been stipulated; but if *specifick* interest have been stipulated, *it is stated as* another case; "or whatever interest has been stipulated by them:" and in this are included the rates of nine and eleven in the hundred, and the like. The text of MENU (33) has the same import; but the expression, "all *borrowers*," suggests *not only* those who travel through forests, or traverse the ocean, *but* any others of the four classes. However, the acceptance of interest above the prescribed rates, from such as travel through vast forests and the rest, is immoral; for there are no grounds of restriction to the text of VRĬHASPATI (35, 7).

Here it should be observed, that large gains are the grounds on which greater interest is paid by those who traverse the ocean; as intimated by the text of MENU, "whatever interest shall be settled by men well acquainted with times and with places." The grounds are the same in other circumstances of the same case, intended by the text of YÁJNYAWALCYA (32); not the risk of losing the principal. Thus the rate of interest is the same, even though the debt be secured by a pledge.

Does not the text of MENU (33) consequently become unmeaning, since CÁTYÁYANA authorizes the payment of stipulated interest by debtors of all descriptions (37, 2)? No; for CÁTYÁYANA declares, that interest, which has been promised, through compulsion, by others than seafaring traders and the rest, shall not be paid; "and in no other case whatever must stipulated interest be paid" (37, 2). But a special rule is delivered (33), to legalize interest promised, through compulsion, by seafaring traders and the rest. This text, however, is considered by CHANDÉSWARA as intending traders in general; and both texts are referred by him to the head of stipulated interest (*cáritá*). But interest promised by others than traders, in a time of distress, is called *cáritá*, *and* must be paid by the debtor; but promised through compulsion, without *any necessity arising from* a season of distress, it need not be paid (37, 2). This is a general instance: sometimes, from the circumstances of the times, even less than legal interest, accepted by the lender, is consistent with usage, and falls under the description of stipulated interest. By accepting it, the lender commits no sin; but by parity of reasoning, a sin is committed by the debtor.*

If stipulated interest above the rate of an eightieth part may be paid by the free consent of the debtor, what is the purport of the text of MENU (41)? Some explain it, "let no lender receive interest on money which has not been lent more than a year." Consequently this belongs to the

* Since the lender sins by exacting more than legal interest, the Commentator thinks a borrower sins by taking advantage of the times to pay less than legal interest.

case of interest without a special agreement; so VISHNU ordains, "after the lapse of one year, debtors must pay interest, as allowed, even though not agreed on *at the time of the loan*."* For example: the debtor, having occasion to incur expense for the nuptials of his son or the like, thus addressed the lender, "advance me this loan without interest; after completing the rites intended, I will repay it, making up the sum by the sale of effects, or by alms anywhere obtained:" the borrower thus contracted the debt: if it be demanded, but not paid, while he remains in the country, it bears no interest for one year; but after that period it bears interest. Such is the purport *of the text*. Then what interest should debtors pay? The Sage propounds it, "interest as allowed;" as declared by the law concerning creditors, at the rate of an eightieth part and so forth, in the order of the *several* classes, *Bráhmanas* and the rest. This interpretation of the text of VISHNU is approved by CHANDÉSWARA. The distinction respecting such, as *fraudulently* go to another country, will be mentioned (Section III).

By the negative in the expression, "let no lender receive, &c." is it signified that he cannot receive it; or joined to the imperative, does it signify, that duty is not fulfilled, and *consequently* that the receipt is immoral? Since no other law intimates the receipt *of such interest* within the year, there is no contradiction: and as there is no law to remove the doubt, how soon a loan, which has been advanced without interest, shall bear interest, it is signified that interest shall not be received within the year. Thus, if a creditor, who had delivered a loan without interest, ask interest from the date of the loan when payment is tendered after the lapse of the year, then payment of interest for the period exceeding one year shall be enforced by the king: and in this case, the year consists of three hundred and sixty days, counted by *sávana* time; as deduced from the texts already quoted from the *Malamásatatwa* (Section I, gloss on text 25).

"He may take interest, which is unapproved" (41); which is not prescribed to lenders by the law, such as interest upon interest, and the rest; but not any other interest except interest upon interest, and the rest: this is an explanatory precept. However, the receipt of interest upon inerest, and the rest, is immoral, as declared by the text of VRĬHASPATI (35, 7).

Is it not impossible there should be interest different both from interest upon interest, and the rest, and from interest at the rate of an eightieth part, and so forth: how can an explanatory precept have been delivered forbidding other sorts? If a man have contracted a debt at the time of harvest for the support of his family, and have hoarded a large quantity of grain; and the price happening to be greatly enhanced, should the creditor at the time of repayment say, "the price of grain which was purchased by thee with my money was doubled in five months, pay me therefore double the principal besides interest thereon:" this explanatory precept is intended to prevent such a transaction. It is accordingly usual in some districts, for lenders, who desire greater profit, to require from the borrower a stipulation for the current price in the month of *A'shhád'ha*.

If such be the meaning, what is the scope of the text of MENU above cited (42)? It is a rule for interest on a debt contracted without *an agreement for* interest; for if a debt so contracted remain long unpaid, it bears interest. This will be particularly discussed in another place (Section

* Cited in its proper place in Section III, (v. 52.)

III). The text is an answer to the question, whether interest shall in this case be taken at the rates prescribed by the law, or in the form of stipulated interest (*cáritá*) and the like : interest beyond the rates prescribed by the law, which suggests the mode of subsistence by money-lending, is invalid. Though asked by the lender, it shall not be obtained. A reason is given : because the wise have declared those rates, as fixed by the law, the *proper* way of lending : hence a creditor of the servile class is entitled *at most* to five in the hundred.

If the rate fixed by the law be the only *proper* way of lending, is not *other* interest, even though promised by the debtor in a time of extreme distress, invalid ? Therefore does the Sage add, "different." Here again fixed rates must be brought forward ; "different from the rates fixed by mutual consent of lender and borrower." Interest different from that, and exceeding the legal rates, is invalid. Such is the sense of the text (42). After how many days does a debt, which remains unpaid, bear interest ? It is answered : "let no lender receive interest arising from a debt which has not exceeded one year." Or the negative may be understood in the phrase, "take interest which is unapproved ;" and the sense is, "let no lender receive interest unauthorized by the law." What is that *interest ?* To this question the legislator replies, "interest upon interest, &c." and the negative here denotes *the* immorality *of such conduct.* Consequently, should a creditor be desirous of receiving interest unauthorized by the law, such as interest upon interest, and the like, he can receive it, but he commits a moral offence. Accordingly VRĬHASPATI declares it reprehensible (35, 7). This interpretation is consistent with the opinion of CULLÚCABHATTA, and should be admitted. Ultimately there is no difference.

It should not be objected, that whatever interpretation has been delivered by ancient authors, that only should be admitted ; because an opinion not matured cannot be well adopted. There is no proof to support their interpretation. Nor should it be said, this text is *sufficient* authority. It is evident, that the text admits of another interpretation : and it must remain a doubt what interpretation should be established, since their comments are discordant. Nor should it be objected, what proof is there to support the interpretation proposed ? It is a *sufficient* argument that the text may coincide with the rule of VISHNU (52) ; for it is a maxim *in logick*, that propositions ought not to be separated in sense, when their coincidence is possible. Nor should it be affirmed, that VISHNU'S rule may be otherwise explained. It is a maxim, that an obvious meaning is to be preferred to a forced construction : it would therefore, say these lawyers, be irregular to explain it otherwise.

On this *exposition of the law*, *cáyicá* is of two sorts ; the *cáyicá* of VYÁSA, and the *cáyicá* of NÁREDA. *The first*, noticed by VYÁSA, by VRĬHASPATI, and by YÁJNYAWALCYA *also* according to the *Dípacalicá*, is in the nature of a usufruct ; but distinguished from interest by enjoyment, in the manner already stated : the use of a pledge is interest by enjoyment (37, 3) ; the benefit arising from the labour of a slave or the like, not pledged, is (*cáyicá*) corporal interest. When the agreement runs in this form, "this cow shall be milked by you one day in each month, and that shall be the only interest on the debt," such interest is named *cáyicá*. Since there is no contract of hypothecation, it is not the use of a pledge. The owner may pledge the same cow to another creditor ; and he may pay the interest otherwise : and another chattel may be required as a pledge for the same debt, to give confidence to the lender,

Again; a debtor may himself work two or three days *for the benefit of his creditor.* In that case also, *the benefit of his labour* is the interest named *cáyicá.* Here the word (*cáyá*) "body" is indeterminate: and the use of a boat or the like, for *the* transport *of goods*, in lieu of interest, is also *cáyicá*; and that must be allowed so long as the principal remain unpaid (35, 6).

When the benefit arising from *the labour of* a slave has been settled as *cáyicá* interest; and that slave, through indolence or inability, performs no labour, but pays money equal to the value of his labour, should that money be received as interest or not? and if it be received, under what description of interest does it fall? It is answered, the money is merely an equivalent for his labour; it should be received and considered as *cáyicá* interest.

If a moneyed man tell some merchant, "receive a hundred *suvernas* from me, and trade with them; whatever be the profit, one half the residue, after paying me interest, must be delivered to me, and thou shalt take the other half for thyself: but, if the capital happen to be lost, the loss shall be solely thine, and I shall recover the whole principal from thee." On these terms the loan is advanced; and the man acts accordingly. Is money so advanced a loan or not? If it be a loan, is the moiety of the profit which is receivable *by the creditor*, interest or not? It is said, since both *the requisites of a loan*, the continuance of the *creditor's* property in the money *lent*, and *the receipt of* a gain, have place in that contract, nothing prevents its being deemed a loan: however, the moiety of the profit which is receivable *by the creditor*, is not interest, but profit arising from commerce.

What exertion for gain is in this case made *by the lender?* Any merchant tells a public officer, "you must prevent the exaction of exorbitant duties payable at wharfs and the like; in consideration of which, I will give you a quarter of my profits:" as in this case the protection afforded by that officer against the exaction of exorbitant duties, is the exertion for which he receives a quarter of the profits, so, in the first case, the act of furnishing a loan as a capital for trade, and the stipulation then made, constitute the exertion on the part of the lender. Or, in both cases, the money *paid* is similar to gratuitous presents of bread, fruit, mangoes, fish, and the like: it is not *cáyicá*, arising from the personal labour of the borrower; nor interest of its own nature, arising from increase *of stock*; for that is not named in the law as a species of interest, nor is it described under any other kind of interest.

If the merchant trade in *tila*, gold, or the like, and the lender receive from the merchant half the *tila*, gold, or the like, gained in commerce; in that case, since the merchant is independent, the lender's ownership is the only motive for the delivery of the thing. The delivery and receipt are consequently civil acts; and the receipt is no acceptance of things bestowed for religious purposes. There is no consequent sin in receiving those things. Thus some expound the law.

VII. *The several Expositions considered.*

But if the merchant fraudulently withhold the moiety of the profit, he is a promise-breaker, and shall be compelled by the king to deliver it. This creditor, however, exacts more *than legal* interest from the debtor's necessities. But interest, which is exacted at *the* pleasure *of the lender*, whether at legal rates, or in the form of stipulated interest, and the like, if it be unreceived for some time, can only be taken to an amount sufficient to double the principal.

If the money be advanced on these terms, "take from me a hundred *suvernas*, and trade with them on our joint account, but interest must be paid me;" that commerce is carried on on account of both parties, and the shares must be so distributed as may have been agreed. But if the lender add, "should the capital happen to be lost, the loss shall not fall on me," and the merchant acquiesce *in those terms*, the whole loss must be borne by him, through the exigence of his affairs, *which compelled him to accept such terms*; but if his assent were extorted by force, the loss shall not be borne by him: this method is consistent with the reason of the law.

In the case supposed, if the merchant who borrows the money trade in salt, lac, or the like, with or without the knowledge of a *Bráhmana* who lent the money, the sin falls on that *Bráhmana* according to *the* circumstances *of his knowledge or ignorance of the particular trade carried on.* This is *a* demonstrated *rule.*

On the doubt, whether it be money advanced for commerce, or money lent, it is said; one half is a loan vesting temporary property in the user, and the other half is money advanced for commerce. Hence there is, in this case, trade in partnership, and a combination of debt and commerce; to receive interest on the whole sum, without a previous agreement, would be therefore contrary to law. But if the lender deliver the money with this stipulation, "the whole sum shall be alone in thy hands, and it shall produce to me half the commercial profit," there, since the two acts (of advancing a sum for trade and delivering it as a loan) are incompatible, the contract of loan shall prevail; for the property of the former owner is divested *by that act.* He shall not therefore receive half the commercial profit, but interest on the whole sum: of the profits of trade so much only, as the merchant may voluntarily give, can be received by the lender. If the capital happen to be lost, whether the exonerating clause ("if a loss happen, it shall not fall on me") be expressed in the agreement or not, the loss does not fall on the creditor, but on the debtor alone. But if an agreement were made for the payment of half the commercial profit by the debtor, it must be paid to fulfil the agreement, as above mentioned. This has been sufficiently explained.

The *cáyicá* of NÁREDA should be explained as in the gloss of CHANDÉSWARA, from the sense of the word *s'as'wat*, repeatedly, or again and again: or the method approved by HELÁYUDHA, the *Mitácshará*, MISRA and others, may be followed: thus *cáyicá* is interest payable daily; and the word *s'as'wat* signifies long, as in the example "*s'as'watíh semáh*, many years," and in other instances. According to VRĬHASPATI, it is included in the description of hair-interest, and must be paid so long as the principal remain undischarged. In the text, it is particularly mentioned, "at the rate of a *pana*, &c." (36, 2) to remove the doubt whether interest should be received daily at the proportional rate of an eightieth part *by the month*: more or less *than that rate* is therefore taken as hair-interest; and such is the current practice. This being the case, the *cáyicá* of NÁREDA, as explained by CHANDÉSWARA, falls under the description of (*cáritá*) stipulated interest.

Were it so, would it not be unpaid; for the text of CÁTYÁYANA expresses, "in no other case whatever must stipulated interest be paid" (37, 3)? payment being requisite when the period, *for which the sum was lent*, had elapsed, the debtor's inability to make immediate payment occurred *as a circumstance of distress.* Therefore interest then settled, *as the considera-*

tion of forbearance, must be paid, though it be (*cáritá*) stipulated interest. But greater interest, promised before the period had elapsed, in consequence of menaces, need not be paid.

But *cálicá* is regulated by the rate of an eightieth part, and so forth: with or without an agreement, it is interest receivable month by month, on the concurrent opinions of many authors. According to this interpretation, if a creditor be desirous of receiving his interest on a loan, of which the interest has not ceased *because it has not yet equalled the principal*, he must take (*cálicá*) periodical interest. In that case there is no limitation of a subsequent period, *beyond which interest may not be received;* a distinction assumed by HELÁYUDHA. Here it should be noticed, that the word "month" is merely a general instance: accordingly MENU states periodical interest generally. Hence that interest, which is receivable every half-year, is also *cálicá*. Consequently, whatever interest is received from time to time, at short periods, before the debt is discharged, is *cálicá*. But this interest may be included under (*cáritá*) stipulated interest. However, *sic'hávriddhi*, which ought to be received day by day, but in some instances is paid by debtors to creditors for many days at once, to save trouble, is not (*cálicá*) periodical interest. The *cáritá* of CÁTYÁYANA has been sufficiently explained.

It should be remarked, that interest at the rate of twenty in the hundred, payable by sea-faring traders and the like, and at the rate of ten in the hundred by those who travel through vast forests and the like, is (*cáritá*) stipulated interest. It should not be asked, how can interest at the rate of twenty in the hundred, and so forth, be deemed *cáritá*, as this is described by NÁREDA (36, 3,) since CHANDÉSWARA, in his gloss on the texts concerning those rates of interest, mentions, that interest at the rate of twenty in the hundred, and so forth, must be paid, even though not expressly promised by sea-faring traders and the rest when the loan was received? As interest at the rate of two *panas* a month for one silver coin, though not expressly promised, is paid by the immemorial custom of the country (on the ground, that interest, formerly settled by certain debtors, expressly promising it to their respective creditors, is considered in practice as stipulated interest, and is therefore now valid by tacit consent, though not specified by an individual borrower, and is adjudged by arbitrators quoting *for their authority* approved usage); so in this case, the text (32) is cited as proof of customary interest. Else law must be established on another foundation than scriptural *authority*.

Accordingly MENU does not specify the rate of twenty in the hundred, and so forth; but says, "whatever interest shall be settled by men well acquainted with sea-voyages, &c." (33). Consequently this sense is deduced *from the text;* such interest only as is settled by merchants shall be paid: if the party himself have not stipulated the rate, that interest only, which has been promised by former borrowers, as instanced by YÁJNYAWALCYA (33), must be paid. In the text of NÁREDA (36, 3) the word "debtor" must be considered as denoting any person who contracts debts, and follows the practice derived from *the example of* eminent persons.

What is the rate for those who do not traverse the ocean, but cross the SINDHU and other great rivers? It is answered, they are travellers by dangerous routes (explaining "*cantáragáh*" in a general sense, instead of restricting it to travelling through vast forests); they must therefore pay ten in the hundred. The meaning is this: such as travel by difficult roads, where life is endangered, necessarily obtain greater profit, and therefore pay higher

interest; but those who voyage by sea (a still more difficult route, in the highest degree tremendous, where life is exposed to the utmost danger,) transporting large cargoes with great trouble, certainly obtain still greater profit; twice as much should, therefore, be paid by them. When no special agreement has been made respecting the rate of interest, what should be received from those traders who neither travel by dangerous roads, nor traverse the ocean, but buy and sell in their own country? Interest at the rate prescribed by the texts, which specify an eightieth part *by the month*; for this text (32) cannot be extended to a general sense. But if they promise to give greater interest, then indeed such interest should be paid (33). Since Chandéswara expounds the phrase in this text, "men well acquainted with sea-voyages," as a mere instance suggesting a trader in general, that general sense is the ground of this inference, coinciding with the *latter part of the* text of Yájnyawalcya, "or whatever interest has been stipulated by them" (32.)

If merchants, whether trading by sea, by dangerous routes, or in their own country, receive a loan from a money-lender, with or without a stipulation for high interest, in expectation of great profit; but if they be afterwards accidentally disabled from travelling for the purposes of commerce, and remain at home, or die; in that case, with what interest should the principal sum be received by the creditor from those persons who have been *thus* unable to trade, or from their sons? It is answered, that sometimes those who travel through vast forests remain afterwards at home ten or fifteen years; when they borrow for the occasions of business, without stipulating the rate of interest, it would be inconsistent with the practice of good men to require from them payment of ten in the hundred. By "those who travel through forests," should be understood "those who *actually* perform a journey through forests:" since there is no journey then performed through forests, interest at the rate of ten in the hundred should not be paid. So in the case proposed, since there is no actual performance of a journey by dangerous routes, ten in the hundred should not be paid, but interest at the rate of an eightieth part, and so forth. But where the merchant actually travels through vast forests, since the whole transaction, from his resolution to undertake the journey, until the conclusion of the journey, is conducted by him *with that view*, a debt contracted by him, even before the journey *be actually undertaken*, is contracted by one who *actually* performs a journey by dangerous routes; in that case, therefore, payment of ten in the hundred is legally required. Sea-faring, "*Sámudra*," here bears its regular sense, as a derivative from the noun (*Samudra*) sea; and a similar exposition is established from its association in the text (32), "such as traverse the ocean, twenty in the hundred."

If the interest have not been settled, legal interest only should be taken; if it have been settled, a similar exposition is established from the import of the words "well acquainted with sea-voyages, and with times and with places," in the text of Menu (33). Therefore, in this case also, interest at the rate of an eightieth part, and so forth, ought alone to be paid; but interest, promised by the debtor, must be paid (37). However, if it be promised through compulsion, it need not be paid, as shown by the sequel of the same text (37,2). But when men travel for the purposes of commerce, such interest, though promised through compulsion, must be paid, else the description stated in the text (33) would be unmeaning, "men well acquainted with sea-voyages."

Is it not *true*, that stipulated interest need only be paid when promised in a time of distress? (37). Yet, in this instance, the borrower experiences no distress; on the contrary, it is a time of exertion for gain. How then can it be intended by CÁTYÁYANA, that interest promised in such circumstances should be paid? *The objection is* not *well founded:* "a time of extreme distress" is mentioned by way of illustration; else, should a man receive a loan from a money-lender, on a stipulation of more *than regular* interest, to accomplish the construction of a house or the like, which he is anxious *to erect*, for *the sake of reward in* a higher world, he would not pay such greater interest, because it was not stipulated in a time of extreme distress; but he who promised greater interest for the sake of performing his father's obsequies, or celebrating his daughter's nuptials, or the like, must pay it: which would be contrary to reason. The opinion of CHANDÉSWARA and others is therefore accurate, that CÁTYÁYANA only declares undue that interest which has been promised through compulsion.

Where a trader, having promised, or not having promised, greater interest through compulsion, traverses forests or seas in expectation of great profit, but *such* great profit happen not to be *obtained*, what interest should in that case be paid? It is said, whether great profit have been obtained or not, the journey through forests or the like is *performed;* therefore interest at the rate of ten in the hundred, and so forth, or *any* interest which has been promised, must in such a case be paid. All this is deduced from the exposition of the text. But in fact the settled rule should be argued from the immemorial custom of the country.

Wheel-interest is explained by CHANDÉSWARA, where the debtor, unable to discharge the arrear of interest, promises to pay it with interest; that interest, which is so promised, is (*chacra vriddhi*) wheel-interest. It should be understood, that, if the creditor, actually receiving the amount of interest from the debtor, at the very same time lends again that very sum to the debtor, it is not wheel-interest; for the amount of interest becomes, in this case, a principal sum. Accordingly it is said, in the following text of MENU, "He who cannot pay the debt."

48.

MENU:—He who cannot pay the debt *at the fixed time*, and wishes to renew the contract, may renew it in writing, *with the creditor's assent*, if he pay all the interest then due.*

For if he pay the sum into his creditor's hands, and, having torn the former writing, and executed another writing, receive the same *sum;* the phrase "may renew it in writing," would not be employed. Since the debt is different from the former debt, the writing is then executed for the debt then contracted, without connection with the former writing. But if he do not discharge the sum, he renews the contract in writing for that same debt with interest, after cancelling the former writing. If an artful creditor himself deliver other money into the debtor's hands, and bid him pay the *former* debt, and the debtor do so, surely in that case it is not wheel-interest; interest upon interest should only be considered as valid when no such artifice is practised. This should be determined by the wise. Other *points* will be stated in the chapter on the Recovery of Debts.

* See 157 where this verse is again cited.

It has been mentioned more than once, that hair-interest is *interest* receivable day by day, in consequence of an agreement in this form, "I will pay it daily." Interest by enjoyment is the use and benefit of a pledged house and the like (35, 5): "the rent, or use and occupation *of a house*, and the produce (*'sadas*) *of a field*," according to the literal sense of the verb *sad*, cut down or reap, as remarked by MISRA. It should not be objected, that interest by enjoyment should be included under *cáyicá* because VYÁSA intends a generic description (39). Why then is interest by enjoyment specially mentioned by CÁTYÁYANA (37, 3) under another name, "use of a pledge?" and why are *cáyicá* and *bhógalábha* separately mentioned by VRĬHASPATI (35)? *but* Sages cannot be censured for the exercise of their *legislative* authority in making a distinction, for the sake of the rule to be delivered, that a pledge is not released so long as the debt be not wholly discharged. Corporal interest, hair-interest, and interest by enjoyment must be paid, so long as the principal remain unliquidated (35, 6) If the payment of hair-interest happen to be discontinued at the end of a few days, or if the corporal interest be not received, or if a pledged field or the like be damaged by the act of GOD or the king, in such cases, when the debt is *afterwards* liquidated, hair-interest, calculated from the date of the loan, must be paid; the value of corporal interest must be made good; another pledge must be delivered for use and occupation; or, if the debtor do not *deliver another pledge*, the value of usufruct must be made good. A full explanation of Pledges may be seen under their proper head. (Chap. III)

If such be the case, does it not contradict the text of MENU (43); for the inferible sense of the law is, that a creditor should not receive more than double the principal paid at once? No; for the original period for the receipt of hair-interest is *the close of* each *successive* day: the text is only applicable to other cases. Is it not seen, in some countries, that hair-interest is not received so long as the principal remain undischarged; but is only received for a stipulated period, or for a certain number of days? To reconcile this apparent difficulty, the text of NÁREDA is adduced; "but the rate customary in the country, where the debt was contracted, may be different" (45).

If a debt have been contracted on a promise of hair-interest, and half the principal have been discharged at the end of a long period, what kind of interest is afterwards adjudged? It is fit that half the hair-interest should be paid; for it is not proper that the whole interest be struck off when the whole principal is not discharged, not that the whole interest be paid when some part of the principal has been discharged: and in the case of corporal interest also, if the use and profit of a female buffalo affording much milk, or of a horse or the like carrying great burdens, have been assigned as *cáyicá* interest; in that case, a part of the principal being liquidated, the debtor may assign the use and profit of another milch buffalo, or of another horse or the like, and not allow the profit of that horse and buffalo; for there is no *law* to show the necessity of allowing the use and profit of the thing originally assigned.

But, in the case of (*ad'hibhóga*) *a loan on* the use of a pledge, a debtor cannot obtain the release of the pledge, however valuable, so long as the principal remain unliquidated (102). For this reason, corporal interest and interest by enjoyment have been distinguished: and the distinction is well explained, as consisting in the existence or non-existence of a contract of hypothecation.

Where the harvest is fixed as the period of a loan in grain, under the rule of HÁRITA (45, 2,) as expounded in the *Retnácara*, the creditor can only receive double the principal *in kind;* interest therefore cannot, in this case, be received at the rate of an eightieth part, and so forth, because the *general* law for an eightieth part is opposed by the *special* rule of HÁRITA. This inference should be questioned, for such is not the meaning of the *Retnácara:* the rule of HÁRITA is there inserted under the head of *(cáritá)* stipulated interest; and stipulated interest does not exclude the rate of an eightieth part, and so forth: for the grounds of excluding the rate of an eightieth part, and so forth, another authority than scripture must *therefore* be established. The rule of HÁRITA should for this reason be considered as relating to stipulated interest regulated by the practice prevalent among former eminent persons, not as establishing a rate for interest on his own authority. Accordingly, should any trader borrow grain on a stipulation for interest at the rate of an eightieth part, and so forth, and selling it conduct commerce, even that is *a* fit *transaction.*

How then should the text of NÁREDA (45) be applied? for it is thus expounded according to the *Retnácara:* 'this rate of interest, an eightieth part of the principal, and so forth, is universal, because it is authorized by the law; but a rate fixed by the immemorial custom of a country, is different therefrom, and is not universal, for such local custom only subsists in particular countries: accordingly in some districts grain is currently received back with an advance of half the principal; in others, with a quarter: but if it were the custom of countries that twice the principal alone should be accepted, it would be so in all *countries.' This objection is* not *well founded;* the particular practice of one country is stated in the rule of HÁRITA, *not an* universal *rate.*

Grain doubled at the harvest is not the highest *limited* interest; but is either legal, or stipulated interest, according to the opinion *which may be followed.* The highest interest *stated* trebles the principal; that is, so much as trebles the principal is the highest *allowable* interest. "So of wool and cotton;" that is, on these, as on grain, so much interest as trebles the principal is the highest *allowable* interest, and interest doubling the principal is different.

"Wool or hair of sheep and the like;" in answer to the question, when is the principal doubled, since there is no harvest of wool? the Sage adds, "in one year" (44). In regard to fibres of grass, and the like, it is also the same: "in one year" is understood; and grass and the like are also similarly doubled in one year; and some hold, that the highest interest on grass and the like is eight fold of the principal. But others think grass and the like are increased eight fold, and bear interest no longer than until the debt be made octuple: such, therefore, is the highest interest on these articles; and the word "so" is not extended to this part of the text, *to declare that interest on grass doubles the principal in one year.* This is founded on the coincidence of the text with that of VRĬHASPATI (67); for "length of time" there denotes the highest *limit of* interest. Why the text (44) is expounded by CHANDÉSWARA, "on grass and the like, the interest is eight fold for one year," may be questioned.

In practice the receipt of grain doubled at the time of harvest is very reprehensible. Its partaking of the nature of *(cáritá)* stipulated

interest is the ground of this notion, since no other grounds of it are perceived. Or interest on grain doubling the principal at the time of harvest is named usury.

49.

NÁREDA:—But the *rate of* interest, which has been mentioned, is considered as usury on grain.*

The meaning of the text of VRÍHASPATI (35, 7) is this: "the use of a pledge after twice the principal has been realized, and the other two cases there stated, are usurious;" this is one proposition; that usury is reprehensible, is another proposition *of the text.* Consequently, the receipt of grain doubled *in one season* being usurious, it follows that it is reprehensible. But the receipt of interest at the rate of an eightieth part and so forth should be held blameless, by reason of the practice established by eminent persons: and interest on grain, doubling the principal, appears to be *(cáritá)* stipulated interest; else it would be exclusive of the six sorts of interest *propounded by Sages.*

Under the term "grain," pease and the like, as well as barley and the rest, are comprehended; for AMERA says, "pease and the like are grain in the pod, and barley and the rest are grain in the ear."

If those who travel through forests and the like borrow grain, at what rate should interest *be paid?* Whatever interest they settle, such interest only should be paid (33). But if no interest be settled, then indeed, since there is no law for the receipt of more than double the principal, interest only doubles the debt. It should not be argued, that the text of HÁRITA (44) ordains twice or thrice the principal payable only by such as traverse forests and the like. No author has so explained the text; but, without specifying the eightieth or other legal rates, it marks the interest usually paid by all persons on *loans of* grain.

Some lawyers remark; when a man has borrowed grain to be repaid two-fold, but is unable to discharge the debt at the time of harvest, and the debt long remaining unpaid, if arbitrators adjudge the payment of three times the principal, at the *current* price of a particular month, together with interest, in that case the treble principal, is suggested by the text of HÁRITA and others (44, &c.); the valuation is grounded on local custom, and the interest is compound interest: but if they adjudge payment of four times the principal with interest, the quadrupled principal is suggested by the text of VRÍHASPATI (63).

Yet in fact all this depends solely on local custom; for the text of HÁRITA, and that of VRÍHASPATI, propound the highest legal interest. At the fit period for limited accumulation of interest, whether three times or four times the principal be then received, the interest is legal; but the receipt of compound interest, antecedent to a promise from the debtor, is not authorized by law. The fit period for limited accumulation will be declared under the title of Limits of Interest.

Admitting that compound interest is reprehensible by general law or local usage, *still the text* (35, 7,) *which declares usurious further benefit* after the principal has been doubled, intends loans in gold or the like; for,

* The last hemistich of a text which is again cited, v, lviii, 2.

since the highest accumulation of interest on clothes and other commodities is declared to extend to three times the principal and so forth, it is wrong to censure the receipt of three times the principal *in such cases.*

A *Bráhmana* asks a loan from another *Bráhmana,* and the lender, exacting a stipulation for interest at the monthly rate of a *pana* in a *purána,* delivers the loan, and the other pays the debt within the year; is the receipt of such interest in this case reprehensible or not? It is said, the receipt of such interest is evidently immoral, since (*cáritá*) stipulated interest itself is immoral, according to the gloss of CULLÚCABHATTA on the words "any interest which is unapproved" (41); and it is held so by MISRA, because the borrower is oppressed by the exaction of excessive stipulated interest and the like.

Periodical interest and corporal interest are also termed immoral by CULLÚCABHATTA: how does that apply; for if the borrower discharge the debt within the year and pay suitable interest, there is nothing blameable in *the receipt of* that *interest?* The answer is, under the authority of the text only; *but* it is not deemed immoral if received from time to time; and the text of VRĬHASPATI is adduced to connect the sense, showing the immorality of periodical interest and the rest, in certain circumstances; not of stipulated interest, *which is universally censured.* Accordingly CULLÚCABHATTA says, "stipulated interest is immoral, even though it have been *freely* settled by the debtor in a time of extreme distress, and by the creditor through kindness." It is consequently an improper proceeding of a lender wilfully to violate the law and exact a promise of more than legal interest. On other expositions also, since the rate of an eightieth part and so forth is alone legal as the primary rate, the receipt of stipulated interest at any other rate is not laudable.

If a debt be contracted with an agreement in this form: "At the end of three months I will repay one coin and a quarter, lend me now one coin;" the interest amounting to a quarter *of the debt* is (*cáritá*) stipulated interest, for the rate of interest and period of the loan are settled by the debtor. In the case proposed by CHANDÉSWARA, interest on a loan advanced with a previous stipulation in this form, "if thou wilt pay interest during one year, or half a year, or the like, then only will I advance the loan," is also a sort of stipulated interest; for, in this case, there is a promise of paying *a certain amount of* interest at the rate of an eightieth part and so forth. But in fact reason shows, that, excepting the *regular* method of receiving the principal with suitable interest, every disingenuous proceeding is immoral.

VIII. *On the Assignment of Bonds, &c.*

In some instances, a creditor has demanded his money from his debtor *in these words,* "Pay the debt of a hundred *suvernas,* which is due to me;" but the debtor has not been able to discharge it; afterwards, the creditor, reduced to poverty by the circumstances of the times, or *even without necessity,* of his own accord, sells the written contract for that debt to some *other* person: this practice is not immoral; for it is not forbidden by the law, nor does it distress the debtor.

To the question, what is sold in the case supposed? the answer is this: not the mere written leaf, for it could not bear so high a price; nor would the purchaser, on a purchase of the written leaf only, be entitled to receive the sum stated in the writing. Nor *is* the debtor *sold;* for the creditor has no property in *the person of* his debtor. Nor *is the* money *which*

has been lent by the creditor *sold*; for *his property in* that money is already devested; or even though it be not *wholly* devested, the seller has not at that time an *indisputable* property therein. Nor *is* the money which will be *subsequently* paid, and which is receivable by the creditor, *sold*; for it cannot in such a case be money receivable by the creditor, since the purchaser, *not the seller*, will have property in the money, which will be paid by the *present* user *or debtor*. It is therefore held by some lawyers, that the money which will be paid by the debtor, is acknowledged as the transitory property of the lender; but, in consequence of the price now received, and of the agreement made to that effect, that property will be devested and transferred to the purchaser: accordingly a sale, consisting in the receipt of a price, is now established from the consequences which are to follow, by means of *taking into consideration* past events:* and the seller has property in the price *received*; for, in consequence of his present expectation of a future receipt, the buyer assents to the transfer of property in the price to the seller. But that is wrong; for, should the debt be never actually paid, in consequence of the debtor's decease or the like, such a transitory property could not be established: since the money payable by the debtor is become null, the sale of it is also null, and the receipt of the price would be therefore invalid.

We think that this is a secondary sale of the promise of payment, like a gift or sale of *moral* purity. Thus, after the receipt of a loan, the lender's property being devested, and property vested in the borrower, the promise of payment is the only ground for the repayment of the loan when its period has elapsed; and that promise disposes the debtor to give effect to the creditor's *revivable* property, through fear of incurring guilt by withholding payment of the money due to the creditor, or in consequence of a complaint preferred before the king, or the like: in the case supposed, that *promise* bought by any person would induce guilt *in the debtor*, if he withheld payment of the debt from the person who had purchased *the promise*; and, exciting his apprehensions of incurring such guilt, or by means of a suit preferred before the king, or the like, it disposes the debtor to give effect to the purchaser's *contingent* property.

It should not be objected, that payment made to the purchaser would be a violation of promise on the part of the debtor, who had said *to the creditor*, "I will pay the money unto thee." It is a rule, that the reason of the law extends to the representative. There is no breach of promise in his paying the money to the purchaser, who is the representative of the creditor; as there is none on the part of him who has promised to give jewels and the like, and who pays their value.

When a field or the like is sold, an interest of the nature of property, similar to the former owner's property, is vested by the sale in the other party; but in this case, by what secondary notion of a vested interest does it become a secondary sale? From the secondary notion of something producing a lien on the guilt of the debtor if he withhold payment of the money, it is *shown to be a* secondary *sale*. Consequently, should the debtor and his offspring happen to die without paying the debt, the loss falls on the purchaser, as *it would have fallen* on a creditor who had not sold

* The philosophical opinion to which I conceive this alludes, is more expressly stated in other places. A past event, that is, its completion, exists metaphysically as a cause of future events. Strict logicians do not admit this metaphysical existence, and are therefore at a loss to connect causes and effects not immediately consecutive. To solve the difficulty, they have recourse to the relation between cause and effect, which they place in philosophical arrangements under the category quality.

the demand; but if a thing sold, yet remaining with the seller, be destroyed by the act of GOD, the price must be refunded by the seller.

In this *assignment of bonds*, one form is a sale made with a written contract previously executed; another is a sale made in the debtor's presence, or with his knowledge; another *again* is a sale before witnesses: these, and many other forms regulated by the custom of the country, such as a sale authenticated by an unattested instrument in the handwriting of the party, or his own recovery of the debt and payment of it to the purchaser, may be understood by a simple exertion of intellect. The form is also similar in the case of hypothecating a written contract of debt: but with this difference, that if the debtor happen not to pay the sum borrowed by him, the intermediate user *or debtor* must make good the debt out of his own funds to the ultimate creditor; and the promise of payment concerns the lender only, but is in the power of the ultimate creditor; consequently the debt cannot be received by the lender, without the assent of the ultimate creditor.

Some person applying to a merchant who lives by money-lending, says, "deliver me cloth to the value of a thousand *suvernas*, and let that value remain a debt due from me;" on those terms, giving a writing, he takes the cloth: what does the value of it become, for no money has been paid? On this doubt it is said, the price of the commodity which was sold, is a debt mentally contracted; interest must therefore be paid on the price of the commodity.

Is not the sense of the word (*rĭna*) debt, 'money or goods delivered, and producing gain *to the lender*, in consideration of its remaining *for a time* with a debtor?' But, in this case, since the price of the cloth was not then paid, it could not be delivered, and the requisites of a debt cannot therefore exist. *The objection is* not *well founded; by fiction* there may be a delivery of the price of the cloth, as there may be *a fictitious delivery* of gold or the like, *given* by way of gratuity, though it be not actually produced.

In the parallel case proposed, there is, on the part of the votary, a present act of volition to annul his own property, and vest property in another, which amounts to gift, and is not imaginary; but here, since there is no such money as that in consideration of which property shall be vested in the buyer, after the property of the seller has been devested, the buyer's property is null; and, the intended delivery being imaginary, is it not actually invalid? Admitting the objection, "deliver" is secondary in the definition of debt: and, in the case stated, the thing lent becomes the property of the buyer, *whether it be* the price or value of the cloth *which is lent, or* only the cloth sold; as in the case of compound interest. This subject has been further treated by me (JAGANNÁT'HA) in the *Rĭnavádárt'ha*. In the case proposed, there is a mixed transaction of loan and sale.

Form of a Writing for a Debt sold.

After writing on the assignment the name of the lender, and so forth, it is usual to write, "this sale of a written contract of debt:" and that is proper; for, by selling the written leaf with the letters inscribed on it, the sale of the thing written is also valid, as the approach of horns is *denoted* when *it is said* a horned animal approaches. Thus, since letters must extend to the words, the sale of the words, *constituting a promise*, is certainly valid. Or it may be written, "this bill of sale of a debt;" by this the sale

of an unwritten debt may also be affected : and it is equally proper in the present case.

On the reasoning above stated, although the thing promised might not be sold, the promise may be sold, and here the meaning of debt is, money received after such previous promise. The debt belongs to the purchaser alone ; hence, if it happen to remain unpaid, the sin consists in not paying the debt due to the purchaser, not in withholding a debt due to the seller. But such interest only as had been promised should be paid ; not interest at the rate of an eightieth part, and so forth, when stipulated interest had been previously promised, and no express declaration was made concerning interest at the time of the sale. If a debt be sold by a *Bráhmana* creditor to a *S'údra*, interest must be received at two in the hundred, the regular rate in the order of classes ; not at five in the hundred : for interest is settled by the agreement made when the debt is contracted. Nor should the purchaser then exact a promise of greater interest, for that loan had been already advanced by another person. But, after the lapse of the period stipulated, should the debtor be unable to discharge the debt, the purchaser, who is become the creditor, may, according to some opinions, exact a promise for stipulated interest, or for the *cáyicá* of NÁREDA, as explained by CHANDÉSWARA, at the rate of a *pana*, or half or other fraction of a *pana ;* for that is the proper time for a stipulation of such interest, and the debtor is then in the power of him who purchased the debt.

Although there be no express text of Sages on the present subject, this and other rules for contracts valid by usage are deduced from the authority of reason copying sacred law for the sake of legal decision in cases of doubt. A portion of the subject has been inserted by way of illustration ; other points may be similarly reasoned by the wise.

Form of a Writing for a Debt pledged.

After writing the name of the lender, and so forth, and subjoining " this contract of debt on the pledge of a debt ;" it should be added, " a debt of so much is contracted by me, giving unto thee, as a pledge, a debt amounting to such a sum contracted by such a one, on an agreement for so much interest, in such a year, month and day, and in the presence of such and such persons," and so forth : it should be *further* written, " if this debt be not discharged by me on such a day of such a year, then the debt due to me by such a person shall be thine," and so forth, according to circumstances. This and other forms, as suggested by common sense, are stated by way of example, to guard against defective writings.

In this case the first debt should not be recovered *from the debtor*, until the close of the period for which the second loan is made. But, *if no more than* half or other portion of the original debt were made over as a pledge, then a proportionate part may be recovered from the debtor ; and it should be inserted in the instrument. However, it is not proper to fix a period for the second loan extending beyond that of the first loan. This and other points may be inferred from reasoning.

Form of a Writing for a Price lent, or Credit given in consideration of Interest.

It should be a document of the debt, not a document of sale only, because the sale is shown by the declaration of the debt ; for the declaration in words runs thus, " I borrow the value of this commodity, so and so,

which is bought of you." It should not be affirmed, that *it might be drawn* conversely; and thus the instrument would be only a bill of sale. Were it so, the debt would not be *the* chief *object of the writing*, and the clause fixing the period *of repayment*, and so forth, could not be well arranged. But, should it be thought necessary to authenticate the purchase, a separate document would be proper. To expatiate *in this place* would be vain. Sales and the like may be similarly authenticated by bills of sale: *but* that should be hereafter discussed under the head of Sales, and so forth.

IX. *On Usage in general.*

Doubts occurring on many subjects have been solved by reference to practice; a decision being therefore valid when founded on the practice observed to exist, is not law useless? Practice, which is founded on law, prevails; hence usage, inconsistent therewith, must be abrogated: but where no express law is found, one should be established on approved usage.(37)

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(37) Thus ASVALÁYANA in his *Grihya-Sútras*, (a treatise prescribing forms for religious ceremonies, &c.) declares:—"Now the customs of countries and places are certainly manifold. One must know them as far as marriage is concerned. But we shall explain what is the general custom." Upon this passage the commentator observes. "If there be contradiction between the customs of countries, &c., and those customs which we are going to describe, one must adopt the custom as laid down by us, not those of the country. What we shall say is the general law, this is our meaning. Amongst the *Vaidehas*, (a caste sprung from a *Vaisya* father and a *Bráhmani* mother) for instance, one sees at once that loose habits prevail. But in the domestic laws continence is prescribed; therefore there is no doubt that the domestic and not the national customs are to be observed."

In the *Sútras* of GAUTAMA, too, a similar line of conduct is traced out. After declaring that the highest authority by which a Government ought to be guided consists in the *Védas*, *Védángas*, and *Sástras*, and old tradition, it is added that in cases where the customs of countries, classes, and families are not expressly founded upon a passage of the *Véda*, they are, notwithstanding, to be observed, if they are not clearly against the principles of the sacred writings, such as would be, for instance, marrying the daughter of a maternal uncle.

In the verse (50) cited in the text, MANU, it will be noticed, prescribes for rules of conduct those forms and observances, which, though not expressly laid down in Codes of Law, should, nevertheless, be regarded in the light of ordinances; inasmuch as they have been practised and approved of by learned and virtuous *Bráhmans*. With regard to the nature and authority of human agreement in general, the views of HARADATTA may be appositely quoted in this place.

According to this writer, human agreement *(samaya)* is of three kinds: *vidhi*, injunction; *nyama*, restriction; *pratishedha*, prohibition. Rules founded upon *samaya* are called *samayácháras*. *Dharma* (virtue) or the quality of the individual-self, in the *sútra* terminology, signifies law, and has for its object *dharma* as well as *adharma*, things to be done and things to be avoided.

"It might be said, however," says HARADATTA, in his commentary on APASTAMBA's *Samayácharika sútras*, "that if *samaya* (human agreement) be the authority for the law, it would be difficult to deny the same authority to the *Bauddhas* and their laws, to worship the holy sepulchre," &c., and therefore APASTAMBA has added the next *sutra*:

'*Those agreements are of authority which were made bg men who knew the law.*'

"We do not say," HARADATTA remarks with reference to these words, "that every agreement becomes of authority, but those only made by men like MANU, &c., who knew the law. But then, it might be asked, how it can be found out that MANU knew the law, and BUDDHA did not? People answer, that BUDDHA could not have had a knowledge of the divine law. But the same might be said also of MANU; and if a knowledge of divine things be ascribed to MANU, on account of the excellence which he acquired by his virtue, then, again, it would be the same for BUDDHA. There is a known verse: *(Sugathoyadi dharmagnya Kapilóneti kaprama: Thavubhoûyedi sarvagnya mathebheda kadam dayoh.)* 'If BUDDHA know the law and KAPILA does not, what is truth? If they were both omniscient, how could there be difference of opinion between them?' If this be not so, a distinction must be made; and this has been done by APASTAMBA in his next *sutra*: '*And the Védas* (are of authority.)'

50.

MENU:—What has been practised by good men and by virtuous *Bráhmanas*, if it be not inconsistent with the legal customs of provinces or districts, of classes and families, let him *(the king)* establish.(38)

What is not inconsistent with the usages of provinces, classes, and families, and has been practised by virtuous and learned *Bráhmanas*, though it be law not found *in codes*, let him establish.

CULLÚCABHATTA.

By the expression, "law not found in codes," it is intimated that law should be established on approved usage, else it would have been said, "if there be no *express* law." But the practice *of forbearance*, which has been introduced by good men, through tenderness, in consideration of the debtor's inability to pay, and so forth, should not be abolished. The use of law is only to prevent the introduction of multiform practices at the will of men of the present generation. Where many texts of law are inconsistent, or many interpretations of the same text are contradictory, usage alone can be received as a rule *of conduct*: and practice, which differs in some respects from positive ordinances, but is not remote from ancient legislation, can only be confirmed by its *general* connection with law. Consequently that practice which is conformable to law is best, but that which is inconsistent therewith must be abolished; yet, if that may not be, practice inconsistent with law must be nevertheless retained. But where no *positive* ordinance is found, there is nothing inconsistent with any known law, and in that case approved usage alone must regulate *proceedings*. Hence it is said, "human tradition is not unfounded." Still, however, the example of learned and virtuous *Bráhmanas* should be followed for the sake of prosperity, not the practice of immoral and foolish *S'údras* and the rest. This and other points may be viewed by a man's own judgment, and it must be so understood in all matters, not in cases of debt alone. Thus have been discussed the various sorts of interest.

"The *Védas*," observes the commentator, "are the highest authority for good and bad; and none of the objections made before could apply to the *Védas*, which are faultless from all eternity, evident by themselves, and as they were revealed, unaffected by the faults of human authors. Therefore, while to us those agreements are of authority which were made by men who knew the law, the *Védas*, again, were the authority for those men themselves, like MANU, &c. And although we have not before our eyes a *Véda*, which is the source of these laws, we must still conclude that MANU and the rest had."

It was by arguments of the above description that the *Bráhmans* endeavoured to establish the authority of their legal text books; and whatever might be thought of these speculations, they certainly lay claim to be regarded as specious and ingenious. For further particulars in connection with this topic, the reader is referred to PROFESSOR MAX MÜLLER'S learned work on "The History of Ancient Sanskrit Literature," from which the materials of this note have been chiefly derived—EDITOR.

(38) This text is cited again in Book I, Ch. VI.—EDITOR.

SECT. III.—*On Interest specially authorized, and specially prohibited.*

ART. I.—*On Debts bearing Interest, without an express Agreement.*

51.

CÁTYÁYANA:—Though a loan be made *expressly* without interest, yet, if the debtor pay not the sum lent after demand, but *fraudulently*(39) go to another country, that sum shall carry interest after a lapse of three months.

Uddhára (*the term employed in the text*) here signifies money received without a promise of interest. "If he go to another country," if he abandon the country in which the creditor resides, that debtor should *immediately* pay the sum lent.

The *Retnácara.*

If he abandon the country in which the creditor resides; that is, if he go to another country.

"After a lapse of three months;" if it have been demanded, *it shall bear interest* at the end of three months.

The *Chintámeni.*

That is, if the sum lent be demanded, but not paid, *it bears interest* after a lapse of three months from the date of the loan. In this case, a loan has been amicably made by the creditor without any stipulation for interest. It is proper that no interest should be paid by the debtor, while friendly intercourse is maintained: but if he do not pay it after demand, the friendly consideration no longer subsists, and interest should therefore be paid. In that case it commences at the expiration of three months under the authority of the law. However, should he fix a near term after the first demand, with the assent of the creditor, and pay it at that term, no interest accrues: accordingly it is said in a text, which will be cited, "after more demands than one."

But no interest accrues within three months, even though the debt be repeatedly demanded; for no law *has authorized it.*

If it be asked what sort of interest? *the answer is,* interest at the rate of an eightieth part, and so forth, as prescribed by law. But CULLÚCA-BHATTA expounds the text of MENU (42) as relating to this case: "Interest exceeding the fixed rates, or those prescribed by law, and contrary to, that is different from, interest agreed on, or, in other words, interest not agreed on, is invalid, and cannot be *exacted:* interest not agreed on cannot be *exacted* at rates not declared by the law; for there can be no interest which is neither settled by the parties, nor prescribed by law." Consequently, in a case, where none was agreed on, interest should be received at the rates prescribed by law, in the order of the classes. So *the following text:*

(39) According to *Hindu* philosophers, fraud (*ch'hala*) or perversion and misconstruction, is of three sorts:—1st, verbal misconstruing of what is ambiguous; 2nd, perverting, in a literal sense, what is said in a metaphorical one; 3rd, generalizing what is particular. (COLEBROOKE, "Miscellaneous Essays," Vol. I, Essay IX, p. 294.)—EDITOR.]

52.

VISHNU :—After the lapse of one year, debtors, *who have not acted fraudulently*, must pay interest, as allowed, even though not agreed on *at the time of the loan.*

"As allowed;" at the rate of two and three in the hundred, and so forth, in the order of the classes. He declares another distinction in respect of interest without a special agreement.

53.

VISHNU :—*Sages have declared it* an usurious mode; yet a lender may exact five in the hundred.

"From twice-born men," must be supplied in the text: hence it is an usurious mode, originating with abject persons. MENU and the rest have declared it *so:* this must be supplied in the text. Consequently a lender may exact, even from a twice-born man, the interest which is receivable from a man of the servile class, or five in the hundred; but such conduct is immoral: and this must be understood of a sum lent without any agreement for interest, and which has been demanded.

54.

CÁTYÁYANA declares it :—What has been amicably lent for use, shall bear no interest until it be demanded back; but if, on demand, it be not restored, it shall bear interest *on its true value* at the rate of five in the hundred.

The rate of five in the hundred, which is mentioned *in these texts*, supposes a debtor of a twice-born class; for, if it concerned a debtor of the servile class, it would not exhibit an usurious transaction, but would be a vain repetition of the rate of five in the hundred. Hence it is CULLÚCABHATTA's interpretation, that, because a lender may exact five in the hundred from a debtor of a twice-born class, therefore do Sages term it an usurious way.

It is, *however*, proper to consider the phrase, "the lender is entitled to five in the hundred," as a mere repetition of the rate of interest receivable from a debtor of the servile class; for it is difficult to establish another rule of interest: and the sense is, Sages have propounded this rate of interest as the way of money-lending; therefore is a lender entitled to it. This may be argued on the authority of VÁCHESPATI MISRA; for he says as much in his gloss on a *subsequent* text (56, 2): and it is proper to establish the same induction in the present instance; for there is no difference; and this interest should be understood in all cases where no agreement for interest was expressly made.

If a debtor, having received a loan free of interest, go to another country after the debt has been demanded, interest is ordained after the lapse of three months; the Sage also propounds interest in the case of a debtor who remains in the same country.

55.

CÁTYÁYANA:—A debtor, who, even residing in his own country, pays not *the debt* after more demands than one, shall be forced, however unwilling, to pay interest on it, though not stipulated, *after the lapse of one year.*

Meaning the very same case, VISHNU says in the text above cited (52), " after the lapse of one year."

According to MISRA, the phrase " *if he* go to another country" (51) is indeterminate; for, citing the last text (55), he says, all this supposes payment fraudulently withheld; but, in a case void of deceit, the rule of VISHNU (52) *is applicable.* Yet, in fact, a journey to another country is equivalent to fraud; but he who resides in his own country is not *supposed* to practise fraud, but only procrastination. Both texts therefore coincide. Thus, the two different periods for the receipt of interest are regulated by the practice or omission of fraud, instanced in the *debtor's* journey to a foreign country, and *his* residence in his own country. It is then only considered as a journey to another country, when the debt cannot be demanded at the place where the debtor resides; not when he merely quits the village, and so forth. Even though both parties reside in the same town, yet if the debtor abscond whenever he sees the creditor, it is *the same with* a journey to another country. Or, if both reside in a foreign country, it is a residence in the same country. Hence both texts coincide in *considering* the fraudulent intent *of the debtor*: and if a debtor, from whom payment is demanded, go to another country after appointing a time *of payment,* and returning pay the sum at the time appointed, there is no fraud.

" Pays not" (55); ' the *debt, or* principal sum,' should be supplied in the text. " After more demands than one;" after repeated demands. The reading approved by CHANDÉSWARA is *ávahét* instead of *áharét*; *still* the meaning is, " must pay to the creditor." Consequently, the ascertained sense of the text is this: in the case of a loan made through friendship, if it be not paid after demand, and any fraud be practised, interest, though not *previously* agreed on, accrues after the lapse of three months; but if no fraud be practised, after the lapse of one year.

56.

CÁTYÁYANA:—Should a man, having bought a marketable commodity, *fraudulently* go to another country, without paying the price of it, that price shall bear interest after three seasons, *or six months.*

2. *Even without a journey to a foreign country,* a deposit, the balance of interest, a commodity sold, and the price of a commodity purchased, not being paid *or delivered* after demand, shall bear interest at the rate of five in the hundred, *if the debtor be a* Súdra.*

* The last verse is again cited in Book II, Chap. I, v. 32.

The third measure of the second verse is read in the *Chintámeni*, *Yáchyamánónachéddadyát*, instead of *Yáchyamánamadattanchét* : *(it makes no change in the sense.)*

Should a man, having taken a marketable commodity or vendible thing, such as cloth or the like, go to another country, that is abscond, without paying the price of it, *that price shall bear interest* after three seasons, or six months. What interest? The Sage subjoins it, " A deposit, &c., shall bear interest at the rate of five in the hundred" (56, 2). The prohibition of interest on a deposit, and on the price of a commodity, will be explained as *restricted* to a deposit and price not demanded. " Balance of interest;" the compound term is in the form of apposition called *tatpurusha*. Such is MISRA's opinion.

The terms may be joined in the form called *Carmadháraya* ; " interest and the balance of it ;" for this apposition is preferable. If it be asked, balance of what? the answer is suggested by the nearest term, balance of interest. Such is CHANDÉSWARA's interpretation. But it may be questioned, why the terms should not be explained, in the apposition named *Carmadháraya*, " remaining interest."

Here it should be remarked, that, according to many commentators, the period when the principal is doubled, excepting this case of periodical interest, is the time when the debt should be paid *by the debtor*, and interest be received *by the creditor*. If a debtor do not pay it, although it be then demanded, but put off payment, saying, " it shall be paid to-morrow, or it shall be paid the day after to-morrow," in that case, legal interest accrues after six months : " balance" is here a general instance. According to others, if an honest debtor, being then unable to discharge the debt, stipulate interest and renew the contract, interest commences from that date, and is wheel-interest : since interest is here stipulated, the rate of two in the hundred, and so forth, is not applicable to this case.

Or it may be thus explained : If a balance of interest only be due, there is no wheel-interest : for this reason the word " balance" is here employed. But, if the whole interest be due, interest also accrues after the lapse of six months, under the rule exemplified by the case of the staff and bread.* But, if the interest have been paid, and the principal only be due, it bears no interest, however long it remain unpaid (43). In this case it must have been particularly specified by the parties, " that, *which remains due*, is the principal ; this, *which is paid*, is the interest." In the case of periodical interest, also, if it be not *regularly* paid month by month, this text (56) is applicable.

" A commodity sold, and the price of a commodity purchased (crayam vicrayam†) :" that which is purchased (*crïyaté*) is (*craya*) the commodity ; that for which a vendible commodity, as a cow or the like, is sold (*vicrïyaté*), is (*vicraya*) the price. Here also three seasons are understood. Therefore, on a bailment, on the balance of interest, on a vendible commodity, and on the price of a commodity, if they be demanded and not delivered, interest must be paid after six months, at the rate of five in the hundred, by a defaulter of the servile class ; for it coincides with the rate *prescribed for that class* (29, 2). MISRA.

* The rule may be thus expressed : " the greater includes the less." The example alluded to is this : one bids another throw away the bread touched with the staff ; of course the staff was no less to be shunned than the bread it had soiled.

† In the usual acceptation, the sense would be ' purchase and sale.'

Some hold, that, if three seasons must be also understood in this text, the preceding text would be superfluous; it is therefore proper not to connect the terms with the three seasons there mentioned. How then is the period determined when interest shall commence on the balance of interest, and so forth? Being mentioned in the same text with *the* price *of a commodity, interest commences* on these, as on the price of a commodity, after three seasons.

That should be questioned; for, since the phrase must be separately referred to "deposit" and the rest, there is no difficulty in this construction of the text, "on the price of a commodity (*vicraya*) interest accrues after three seasons." Why has not the Sage inserted in this text, "after three seasons," and, "go to another country," and omitted those terms in the preceding text? *The objection is* not admissible, for with Sages there can be no expostulation.

By saying, "must be paid by a defaulter of the servile class," it is established, that, in the case of amicable loans, interest at the rate of five in the hundred shall only be paid by a *Súdra;* for interest on *such* a loan, and on deposits and the rest, can only be payable *by him*, after the lapse of three months, and six months respectively. Therefore a man, who, after receiving the price of the cow, does not deliver that cow when demanded, though sold by him, and a purchaser who does not pay on demand the just price of a commodity purchased, must pay interest at the rate of five in the hundred *and so forth*, in *the inverse* order *of classes.*

The *Retnácara.*

For a series may be either direct or inverse.

Does the cow, or the price of the cow, bear interest at the rate of five in the hundred? It is the same thing; for, since a cow cannot be divided, it is only her value that is divided, as has been already mentioned. If a man, having bought a cow, go to another country without paying the price, must the cow or the price be delivered with interest after three months? It is said, the price only must be paid with interest; for, after the purchase, the cow became the property of the purchaser. Accordingly, on religious occasions, people dismiss bulls and the like, which they have purchased for a price promised *but not yet delivered.* Purchase is only forfeited by neglect during a specific time. To expatiate would be vain. But he who, having sold a cow and received the price, does not deliver the cow sold, must give her with interest after six months.

In the preceding text a demand must be absolutely understood: if the thing be demanded but not delivered, it bears interest; not, if no demand be made. Again; under the expression "go to another country" (56, 1), interest after three seasons is ruled, if fraud be practised, by the same reasoning with that above stated.

57.

CÁTYÁYANA:—But he who, having received a Chattel lent for use, goes to a foreign country without restoring it, must pay interest, according to the value of it, after three seasons, *or six months.*

"A Chattel lent for use" (*yáchitaca*); a thing intrusted to him.

The *Retnácara.*

Meaning ornaments or the like for decoration, which a man, asking (*yáchitwá*) from any person, has obtained. In regard to this, the same practice prevails with that respecting *other* bailments.

But Misra says, the *following* texts of Náreda concern Chattels intrusted for use.

58.

Náreda:—There shall be no interest, without a special agreement, on valuable things lent through friendship *for use, not for consumption;* but, even without agreement, property so lent bears interest after half a year;

2. This is declared to be the legal rate of interest on amicable loans. But the *rate of* interest, which has been mentioned, is considered as usury on grain.

He thus expounds the texts: the word "give" here signifies intrust or lend *for use;* there is not consequently any contradiction to the text above cited (51).

Such being the case, it is made evident, that a loan for use, which is similar to a deposit, bears interest after six months, if it be not restored *on demand.* But the text of Náreda is cited by Chandéswara, after discussing loans for use, with the text of Vishnu (52) interposed. This opinion is thereby intimated: a loan advanced *free of interest,* in consequence of some apprehension from human causes, bears interest in three months after it has been demanded; but a loan, which is advanced through friendship, bears interest in six months after it has been demanded. The text of Cátyáyana (54) is cited in the *Viváda Chintámeni,* and by Cullúcabhatta, for this import; and *this* text must be similarly expounded. This observation of some lawyers is not *well founded:* for Chandéswara has thus arranged *the compilation*: inserting all the texts of Cátyáyana, he quotes texts of other Sages; else, if the text of Cátyáyana, (54) had the same import with that of Náreda, it would be wrong to interpose *another.* Therefore Misra's interpretation should be deemed right in this instance.

The term "without agreement," which occurs in both hemistichs, signifies "not in any manner expressed in words," *that is,* not stipulated: hence, if interest have been expressed by the borrower, the creditor may exact some *interest.* "Without agreement" *may be explained* without a declaration of its bearing interest, without any stipulation of interest; for the particle A is explained by Amera, assent or promise. Or the term might signify "interest not settled with the consent of the borrower," and, as here used, "that which has not been settled to bear interest with the consent of the borrower."

"Usury on grain" (58, 2); on grain lent without any agreement for interest, but not repaid on demand. The rate of interest, which has been declared by Sages, such as twice the principal, and so forth, is deemed, usury. On a loan advanced, with a declaration that interest shall on no account be received thereon, should the creditor afterwards require interest, from the circumstances of the times, or in consequence of a breach of promise, no such interest is allowed: though not declared by the text of any Sage, this may be deduced from reasoning by wise *investigators.*

According to MISRA, interest accruing in all these cases, after the lapse either of three or of six months, must be understood of payment fraudulently withheld; but, if no fraud be practised, interest commences after the lapse of a year, under the rule of VISHNU above cited (54). In fact, a journey to another country indicates fraud; and another country is that, during the debtor's residence, in which the creditor cannot demand payment of the debt: herein MISRA and CHANDÉSWARA concur. But, according to CHANDÉSWARA, a debtor offends not by going to another country on urgent business, as has been already noticed. In the case of a commodity purchased and the rest, interest also commences after the lapse of a year, if the debtor have not gone to another country: this is deduced from the expression in the *Viváda Chintámeni*, "in all these cases;" and is not disallowed by CHANDÉSWARA, CULLÚCABHATTA, and the rest.

On a loan made without interest, and of which payment is withheld after demand, interest accrues at the end of three months: on other things fraudulently withheld after demand, such as a deposit, a bailment for use, or the like, interest accrues at the end of six months; but not restored through inability, and submissively refused, they bear interest after the lapse of a year. Such is the opinion of CHANDÉSWARA, CULLÚCABHATTA, MISRA, and others. If payment be withheld by one taking the protection of some person who may owe the creditor, how soon interest commences in such a case, is not expressly said by any author.

According to the *Mitácshará*, interest is in some cases due without a special agreement, as is declared generally by NÁREDA (58); but remarking, that "interest without a special agreement is *in certain cases* prohibited," *the author of the Mitácshará* subjoins, as a particular rule, the text *subsequently cited* (71). Consequently, from the several applications of the general and particular rules, interest without a special agreement accruing at a certain period on loans advanced free of interest, appears obviously suggested; but no interest, without a special agreement on the price of a commodity, and the rest. That, however, is not satisfactory; for interest without a special agreement is allowed on things amicably lent; and fines and the rest would be vainly included in the second text (71). This text, therefore, is not opposed to the preceding text (58); but it restrains a purchaser, who covetously demands interest at the same rate with loans, because a commodity purchased by him has long remained with the seller. Accordingly the text of CÁTYÁYANA (56, 2) has a similar import; and the same rule should be understood in regard to the price of a commodity purchased.

In this gloss, the third measure of the text of CÁTYÁYANA (57) is read "after the lapse of a year," instead of, "after three seasons." Consequently, should a man, who has received a loan exempt from interest, go to another country before it be demanded, *he shall pay* interest after the lapse of one year (57); but if he go to another country without restoring it after it has been demanded, *he shall pay* interest after a lapse of three months (51). The word "*yáchitaca*" must signify a loan in general, instead of a chattel lent for use, for this text (57) is inserted after stating the text *first cited* (51). If one, who remains in his own country, do not pay the debt after a demand, it bears interest from the date of the demand; for the text of CÁTYÁYANA (55) does not specify a period.

According to this gloss, what is the purport of the text of NÁREDA (58)? The answer is, two cases have been declared according as the

debt has, or has not, been demanded from one who goes to another country; in regard to him who resides in his own country, one case has been declared, *that is, the case* where the debt has been demanded; it is proper to refer the text of NÁREDA to the case of one who resides in his own country, but from whom the debt has not been demanded. Were it so, what would be the rule where a demand was made after a lapse of seven months? In reply it is asked, why does the creditor neglect interest, to which he is entitled under the authority of the text, after the lapse of six months? if through tenderness he exact not interest, the debtor need not pay it.

On this exposition, the text of VISHNU (52) concerns one who has received a loan for use, and goes to a foreign country before it has been demanded; and the text of CÁTYÁYANA (56) ordains interest, after six months, on deposits and the like *not restored* after demand. According to this interpretation, if ornaments or the like be asked and obtained for a nuptial festivity or the like, they are similar to a deposit, and are not loans, for they are stated by YÁJNYAWALCYA with deposits (Book II, Chap. I, v. 10). But if an agreement were made at the time of receiving a loan exempt from interest, or the like, in this form, "it shall be restored by me at the end of one year;" in this and similar cases, if the thing be not restored after the period has elapsed, it then bears interest, and not after six months. This and similar rules may be deduced by the wise from arguments consistent with common sense. But the author of the *Mitácshará* is revered by CHANDÉSWARA and the rest, and is more ancient than they. Of the two opinions which should be rejected, which adopted in practice, must be determined from the difference of times and of places.

ART. II.—*On the Limits of Interest.*

59.

GÓTAMA:—The principal can *only* be doubled by length of time, *after which interest ceases.*

That which is lent (*prayujyaté*), is (*prayóga*) the principal. The money lent can be doubled, that is, can only be doubled; else it would be useless to declare, that twice *the principal* may be received on account of the length of time *elapsed*. By the word "only" it is forbidden to receive more than twice the principal. Accordingly CHANDÉSWARA says, the word "or" in a text already quoted from VRĬHASPATI (3) is indefinite, and also suggests a debt doubled, or the like. "By length of time;" counting from a period somewhat less than sufficient to double the principal, interest ceases if the debt remain longer due. This is meant in a text cited from VRĬHASPATI (26). Else the mention of double the principal in a text of law propounding right and wrong would be useless. The text cited from HÁRÍTA (30) makes this evident; for the verb there used (*sansthá*) signifies *stops or* "bears interest no longer:" and this interest, sufficient to double the principal, is the highest interest receivable on gems, *gold*, and the like, not on grain or the like, for *such limitation of interest on grain and the rest* is opposed by a special text, which will be cited.

CHANDÉSWARA remarks, "this concerns a loan of valuable things in general:" by the term "in general" it is declared that this text is a

general law; it follows, that special rules are thereby opposed. Accordingly MISRA declares the full meaning; "this concerns gems, *gold*, and the like, as ordained by CÁTYÁYANA."

60.

CÁTYÁYANA:—For gems, pearls, and coral, for gold and silver, for cloth made of *cotton, the* produce of fruit, *or made* of *silk*, the produce of insects, or *made* of *wool*, the produce of sheep, the interest stops when it doubles the debt.

"Stops when it doubles the debt;" accumulates no further. "Coral," expressed in the plural, implies "and the rest," by which shells are included *in the text;* for HÁRÍTA declares, that interest ceases when it has doubled the principal at the rate of eight *panas* in twenty-five *puránas*. (*Purána* is a name for *a certain number of* shells.) This induction is consistent with practice; and it is proper that double the principal be the limited accumulation on shells, since no special rule has been declared. It is the same in respect of conchs and the like.

"Of the produce of fruit;" as cotton and the like.(40) "Of the produce of insects;" as silk and the like.(41) "Of the produce of sheep;" as blankets and the like. The *Retnácara.*

61.

MENU, stating generally, that "interest on money received at once, *not month by month, or day by day, as it ought,* must never be more than enough to double the debt, *that is, more than the amount of the principal paid at the same time,*" adds a special rule:—On grain, on fruit, on wool or hair, on beasts of burden, *lent to be paid in the same kind of equal value,* it must not be more than enough to make the debt quintuple.*

"Grain;" as rice, barley, or the like. "Fruit" (*s'ada*) or any thing produced from trees. Here "tree" is merely illustrative, for "the produce (*s'ada*) of a field" occurs in a text which will be cited from GÓTAMA

(40) As flax is characteristic of Egypt, so cotton may be regarded as a product belonging exclusively to India. In *Sanskrit* cotton is called *Karpas;* from which source evidently, the Latin name *Carbasus* is derived. In the book of ESTHER, Ch. I, v. 6, the epithet "green" in the English version, is rendered in the Vulgate, *carbasinus*. The word is frequently met with in later Roman writers, as expressive of the quality of the manufacture. For instance, PRUDENTIUS calls a cotton sheet *palla carbasea* (*Psychom*, 186); and STATIUS in his *Thebaid* VII, v. 658, speaks of *carbasei sinus;* so also VIRGIL, and CICERO uses *carbasea vela*, for cotton tent-cloths.—EDITOR.

(41) Silk was considered by the ancients as the produce exclusively of China, the country of the *Seres*. Its cultivation in Europe, seems to have been introduced by the Emperor JUSTINIAN about A. D. 530. The frequent allusion to silk in the most ancient *Sanskrit* books, though not likely to disprove fully the claims of China in respect thereof, still the mention of an Indian class whose occupation it was to attend to silk-worms,—for example—*Pundraka*, feeder of silk-worms, and *Pattasutrakara*, silk-thrower—may be admitted as proof that the rearing of silk-worms and the manufacture of silk, were things not unknown in early ages—in India. The above names occur in the *Rudra-yamala*, a work of some authenticity, and one of the most ancient *tantras* or ritualistic treatises among the Hindus.—EDITOR.

* The first hemistich has been already quoted (43).

(62). "Wool or hair," what is afforded by sheep, *cows*, and the like, as wool, cow-tails, and the like, *as appears* from the derivation *of the word* (*lava*) *what* is shorn (*lúyaté*). The *Retnácara.*

What is shorn (*lúyaté*) is wool or hair (*lava*), such as wool and other hair on the body (*lóman*). CULLÚCABHATTA.

"Hair" (*lava*); anything to be shorn (*lavaníyam*), except wool; that is, hair on the body (*lóman*) and the like. The *Viváda Chintámeni.*

"Wool or hair" (*lava*); cow-tails and the like. The *Dípacalicá.*

"Wool or hair" (*lava*); the fleece of sheep, the pod of musk-deer, and the like. The *Mitácsharà.*

All therefore agree, that the word "*lava*" is synonimous with *lóman*, being derived from the same crude verb (*lu*, cut or shear). But MISRA thinks, hair other than that of sheep is meant in the text of MENU, because it is opposed by the text of CÁTYÁYANA (60). But, according to the *Retnácara* and the rest, this text (60) concerns cloth alone; it is almost expressly said so by CHANDÉSWARA.

"Beasts of burden;" employed for transport, as horses and the like. On these, the interest of the loan must not exceed the quintuple; with the principal it must not amount to more than quintuple; it can produce no more. *That* the quintuple includes the principal *is thus inferred*; as it is declared, that a debt is doubled in fifty months, and *accumulation* then stops; that is, interest ceases; and consequently the principal is one part, and the interest another part, which united make the double sum; so, in this case also, by parity of reasoning, the principal is one part, and the interest four parts, which united make the whole quintuple sum. Accordingly, any such debtor, who has borrowed grain or horses valued at a hundred *pieces of money*, *for interest* at the rate of two in the hundred, however long the period of *debt may be*, can only be liable to pay grain and the like amounting *in value* to five hundred *pieces of money*, and no more.

The *Retnácara.*

Here the rate of two in the hundred is a mere example: on a loan secured by a pledge also, where the rate of interest is an eightieth part of the principal *by the month*, the interest can only double the principal, which consisted of gems, *gold*, or the like: and, by parity of reasoning, it can only make the debt quintuple, if it consisted of grain or the like; for no other limit of interest is found in the *codes of* law. VRĬHASPATI (26), declaring that the principal is doubled even in the case of a loan secured by a pledge, states that alone as the limit of interest; and it concerns gems, *gold*, and the like, for it has the same import with the text of CÁTYÁYANA (60).

On this it should be remarked, say some lawyers, that the rule regards priests only; but, if the debtor be of the military or other class, interest must make the debt treble, quadruple, or quintuple, in the order of the classes: else it would be a great disparity, that interest payable by a *Súdra* should cease after twenty months; and, payable by a *Bráhmana*, after fifty months. That is wrong; for no Sage has mentioned interest on gems, gold, or the like, more than sufficient to double the principal. As interest on a loan secured by a pledge stops at the end of six years and eight months,

but, if there be neither pledge nor surety, at the close of fifty months; so, if the debtor be of the sacerdotal class, interest stops at the end of fifty months, but, if he be of the servile class, at the end of twenty months: there is no *unjust* disparity.(42)

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(42) From this and other passages scattered in the present work, the reader will not fail to observe that among Hindu Society the *Bráhmans* were invariably regarded as the privileged class,—possessing various social and political rights in which the other subordinate castes did not participate. Subjoined are a few extracts from the Institutes of MANU, touching the pre-eminence of the *Bráhmans* :—

"Since the *Bráhman* sprang from the most excellent part, since he was the first-born, and since he possesses the *Véda*, he is by right the chief of this whole creation." Chap. I, verse 93.

"Of created things the most excellent are those which are animated; of the animated, those which subsist by intelligence; of the intelligence, mankind; and of men, the sacerdotal class." Verse 96.

"The very birth of *Bráhmans* is a constant incarnation of DHARMA, (God of Justice) for the *Bráhman* is born to promote justice, and to procure ultimate happiness." Verse 98.

"When a *Bráhman* springs to light he is born above the world, the chief of all creatures assigned to guard the treasury of duties, religious and civil." Verse 99.

"Whatever exists in the universe, is all in effect though not in form the wealth of the *Bráhman*; since the *Bráhman* is entitled to it all by his primogeniture and eminence of birth."

"The *Bráhman* eats but his own food; wears but his own apparel; and bestows but his own in alms; through the benevolence of the *Bráhman* indeed, other mortals enjoy life." Verses 100, 101.

"Let not him, who knows this law, even assault a *Bráhman* nor strike him even with grass, nor cause blood to gush from his body." Chap. IV, verse 169.

"A king, even though dying with want, must not receive any tax from a *Bráhman* learned in the Védas." Chap. VII, verse 133.

"A once born man, who insults the twice born with gross invectives, ought to have his tongue slit; for he sprang from the lowest part of *Bráhma*."

"If he mentions their names and classes with contumely, as if he say "Oh! DEVADATTA, thou refuse of *Bráhmans*," an iron syle, ten fingers long, shall be thrust red-hot into his mouth." Chap. VIII, verses 270, 271.

"Never shall the king slay a *Bráhman* though convicted of all possible crimes; let him banish the offender from his realm; but with all his property secure and his body unhurt." Chap. VIII, verse 380.

"Let not the king, although in the greatest distress for money, provoke *Bráhmans* to anger by taking their property." Chap. IX, verse 313.

"What prince could gain wealth by oppressing those, who, if angry could frame other worlds and regents of worlds, could give being to new gods and mortals." Verse 315.

"A *Bráhman*, whether learned or ignorant is a powerful divinity. Verse 317.

"Though *Bráhmans* employ themselves in all sorts of mean occupation, they must invariably be honored; for they are something transcendently divine." Verse 319.

We, however, occasionally meet with passages showing the utter inefficiency of the mere study of the *Védas*, and outward form of austerities to secure happiness:—for instance,—

"To a man contaminated by sensuality, neither the *Védas*, nor liberality, nor sacrifices, nor strict observances, nor pious austerities ever procure felicity." Chap. II, verse 97.

"As an elephant made of wood, as an antelope made of leather, such is an unlearned *Bráhman*; those three have nothing but names." Verse 157.

The above passages, some of which are cited in this work, speak for themselves, and require no comment.

By way of conclusion it may be mentioned, that, in later times, when the sects of *Vishnu* (*Vaishnavás*) and SIVA (*Saivas*) had sprung up among the *Bráhmans*, and the Indian world was divided between them—the *odium theologicum* running high,—it would seem that different deities had been ascribed to different castes; and even particular families appear to have had assigned certain gods which were more exclusively celebrated—as the *Lares* and *Penates* of the Romans of old. In the following quotation from the *Vasishta-Smriti*, the *Saivites*, who are the opponents, are handled, it will be seen, rather roughly, by the follower of the opposite doctrine.

"A *Bráhman* versed in the four *Védas*, who does not find VASUDEVA, (KRISHNA) is a donkey of a *Bráhman*, trembling for the heavy burden of the *Véda*. Therefore, unless a man be a *Vaishnava*, his *Brahmahood* will be lost; by being a *Vaishnava* one obtains perfection, there is no doubt. For NÁRÁYANA (VISHNU) the highest *Bráhman*, is the deity of the *Bráhmans*; SOMA, SURYA, and the rest, are the gods of the *Kshatriyas* and *Vaisyas*; while RUDRA and similar gods ought to be sedulously worshipped by the *Súdras*. When the worship of RUDRA is enjoined in the *Puránas* and law books, it has no reference to *Bráhmans*, as PRAJAPATI (BRAHMA) declared." The worship of RUDRA and the *Tripundra* (the three horizontal marks across the forehead with ashes of cow-dung, &c.,) are celebrated

Interest on grain or the like makes the debt quintuple in so much time as is sufficient for interest to become equal to four times the debt, whether at the rate of an eightieth part and so forth, if a pledge or the like have been given, or at the rate of two in the hundred and so forth, if there be neither pledge nor surety; not in so much time as would make *other* debts double: else, since the law ordains monthly interest at the rate of an eightieth part and so forth, something less than twice the principal would be received on grain or the like, if the period elapsed were one day short of eight months above six years, but five times the principal would be received on grain and the like if the eighth month were completed; which would be a great disparity. Since fifty months and various other periods are not ruled *universally*, it is proper to affirm, that interest ceases at those periods respectively, when it has risen to so many times the principal.

62.

GÓTAMA:—Interest on milk or curds, on *the* hair *of goats and the like,* on the produce of a field, and on beasts of burden, shall rise no higher than to make the debt quintuple.

What is produced from cattle (*pas'órupajáyaté*) is (*pasúpaja*) the produce of cattle, such as milk and the like, excepting *however* clarified butter.

The *Chintámeni*.

In the *Retnácara* a gloss is found, "milk, clarified butter, and the like." It is liable to objection; for interest making the debt octuple will be declared for clarified butter.

"Hair" (*lóman*); wool; for AMERA explains wool, the hair of sheep and the like.

"The produce of a field;" fruit produced from a field as barley, wheat, plantains, mangoes and the like. The *Retnácara*.

It is also proper to include grain *in general* under this *term*. Interest on grain, making the debt quintuple, is declared by MENU and GÓTAMA *but* by VRĬHASPATI it is declared to make the debt quadruple.

63.

VRĬHASPATI:—On the precious metals *or gems* the interest may make the debt double; on clothes and inferior metals, treble: on grain, quadruple; so on fruit, beasts of burden, and wool or hair.

"Precious metals;" gold and silver. The *Retnácara*.

It is a general expression comprehending gems and the like; for the rule coincides with that of CÁTYÁYANA (60).

The term "inferior metals" signifies *all* other minerals except gold or silver, namely copper and the rest. The *Retnácara*.

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in the *Puránas* but only for the *Kchatriyas, Vaisyas* and *Sudras*, and not for the others. Therefore, ye excellent MUNIS, the *Tripundra* must not be worn by *Bráhmans*."

The above extract affords, no doubt, a fair specimen of the *genus irritabile vatum* prevailing among Hindu dogmatists.—EDITOR.

Exclusive also of gems and the like; for otherwise it would contradict CÁTYÁYANA. It is ordained by this *text* (63), that interest on grain, fruit, hair or wool, and beasts of burden, may make the debt quadruple.

64.

VISHNU, cited in the *Retnácara*:—On precious metals, *or gems*, the highest interest shall make the debt double; on cloth, treble; on grain, quadruple; *on fluids, octuple:* on female slaves or cattle, the offspring shall be taken as interest.

On female slaves and the like, and on cattle, such as cows, female buffaloes and the like, which the owner, unable to maintain them, has lent to some person that they may be supported and bear offspring, allowing *as the consideration of their support* the milk *of the female quadrupeds,* or the service *of the female slaves,* and which have remained long with him, the offspring shall be the only interest; that is, no other interest shall be taken. CHANDÉSWARA.

The text should be read, "on grain treble, on cloth quadruple;" by which the remark of CHANDÉSWARA is justified: "VISHNU, VAŚISHT'HA, and HÁRÍTI, declared that interest on grain may make the debt treble."

Before the phrase, "on female slaves and cattle, the offspring shall be the interest," "on fluids octuple" has been omitted by the error of the transcriber; for it is found in the *Viváda Chintámeni,* and the same is propounded by YÁJNYAWALCYA. "Fluids" intend salt (*though crystallized*), and oil and similar commodities.

65.

YÁJNYAWALCYA:—The offspring of female slaves or cattle *shall be taken as interest;* on some fluids the highest *accumulation through* interest may be eight times as much *as the principal;* on clothes, grain, precious metals or gems, it may be *in order* four times, three times, or twice as much *as the articles lent.*

The offspring of female slaves or cattle, taken as (*vrĭddhi*) interest, or increase in its accepted sense, is not the highest *legal* interest (*paramavrĭddhi*), for the term is explained by authors according to its derivative sense *varddhana*) increase in general (from the crude verb *vrĭdh*, grow): the offspring of cattle and of female slaves is the only interest; it is possible that cattle and female slaves should be lent by one who is unable to maintain them, and who wishes they should be supported and bear offspring.

The *Mitácshara.*

SÚLAPÁNI, in *his* commentary on YÁJNYAWALCYA, says; since there can be no other interest on female goats and the rest, and on female slaves and the like, placed as pledges, their offspring is the only interest. The highest interest on oil and the like lent at interest, being added to the principal, makes the debt octuple, and accumulates no further.

Thus, according to some opinions, cattle and female slaves are not considered in such a case as constituting a debt; and it is intimated in the

gloss of the *Mitácshára*, that they do not constitute a debt: since they belong to the original master alone, they do not fall under the description of debt. Yet, if female slaves and the rest be at any time accepted as loans by any person, then the limit of interest should be deemed the same as on gems, *gold*, and the like; for no special rule has been delivered.

"Cattle" is understood in the feminine gender, from the contiguous term "female slaves;" hence it is rightly expounded, female goats and the like, and cows and female buffaloes and the like: in fact the term "female *slaves*" is a general illustration.

66.

VAŚISHT'HA:—Gold, silver, and gems, may be doubled; grain trebled; fluids, *as sugar just expressed and the like*, are under the same law with grain; and *so rare* flowers, roots, and fruit: what is sold by weight, except *gold and the like*, may make the debt eight fold.

"Fluids;" the juice of sugar-cane and the like: these also are trebled.

The *Retnácara.*

It is expounded, juice of sugar-cane and the like, because it will be declared, that oil, salt, and similar commodities, are increased eight fold.

"And flowers, roots, and fruit;" by the particle "and" the phrase is connected with the word trebled, to which the sense of the text reverts: the construction therefore is, "so flowers, roots, and fruit, are also trebled." CHANDÉSWARA gives a similar exposition. In the *Viváda Chintámeni* it is observed, that interest on the produce of fruit, insects and sheep, and on flowers, roots, and fruit, is declared by CÁTYÁYANA (60), and by VAŚISHT'HA (66) to make the debt double, and treble. The passage at large will be quoted from MISRA in another place.

"What is sold by weight;" literally, what is held in the scale; namely, at the time of sale for the purpose of determining its quantity; and that is camphor and the like. Although gold and the rest be likewise sold by weight, yet they cannot be intended by the text, because a special law, limiting accumulation to twice the principal, opposes *that construction.*

Interest on grain trebles the debt (44, 2). Grain may be doubled at the time of harvest, that is, when new grain is gathered; it may be doubled at that season, even within two or three months from the *date of the* loan. But, if not repaid at the season when new grain is gathered, it is trebled, and bears no further interest. "So may wool, &c." wool and cotton bear the same interest with grain. "Fibres of grass," or reeds, and grass and the rest, may be increased eight fold in one year. Such is the sense of the text (44, 2.)

The *Retnácara.*

From this gloss it follows, that interest on grain *only* trebles the debt. Consequently, VÍSHNU, YÁJNYAWALCYA, VAŚISHT'HA and HÁRÍTA, propound *the limit of interest on grain at* three times the principal. But this contradicts the accumulation stated in the texts of many Sages, "three times, four times, and five times the principal."

On this point MISRA says, if the price of grain, after the crop is produced, have fallen below the price it bore at the time when it was lent before the harvest, the debt may be trebled; if the price be more reduced, quadrupled; if still more reduced, quintupled; but when the price has fallen very little, the debt is only doubled: and he expounds the text (44, 2) otherwise, as will be mentioned. According to this gloss, it appears, from the circumstances mentioned, "lent before the harvest, and repaid at the time of harvest," that the limits of interest are not stated in *the text*: consequently, when interest is received at the legal rate of an eightieth part and so forth, how far does accumulation extend? To this question there is no answer. If it be affirmed, according to this exposition, that interest doubling or trebling the debt is opposed to the rate of an eightieth and so forth, then it contradicts the *Retnácara*; for there interest is stated at two in the hundred and the like, and it is inconsistent with reason to admit a different rate of interest upon grain from *that, which is prescribed for* other articles. This and other objections may be suggested.

The author of the *Retnácara* reconciles the seeming inconsistency of such forms *of interest*, by distinctions relative to the good or bad qualities of the borrower, and the differences of time and place. SÚLAPÁNI holds, that the texts should be expounded according to the length or shortness of the period elapsed. In the *Viváda Chintámeni* several modes are stated.

The opinion, intimated in the *Retnácara*, is, that interest on grain doubling the debt at the time of harvest, similar interest on wool and cotton, and interest on reeds, grass and the rest, making the debt octuple in one year, concern debtors of mixed classes; for, stating the *first* text of HÁRÍTA (34 and 44, 1) as intending borrowers of mixed classes, the author cites the other text (44, 2), prefacing it with the word "so;" else, if it only concerned the limits of interest, it would be incongruous to cite it under that *other* title. Accordingly, in his gloss on the text of CÁTYÁYANA (60), he expounds "produce of fruit" cotton and the like. But interest trebling the debt is stated as the limit of interest; for that coincides with the text of VAŚISHT'HA (46).

It is said, interest on reeds, grass and the rest, makes the debt octuple at the close of one year; what is the accumulation on produce *of fields*, and on beasts of burden and the like? The answer is, when twice the principal is the limit of interest, there the order of classes is supposed: in other circumstances, the rate of interest on produce, on beasts of burden and the like, is different; and the rate assumed is that which is propounded by HÁRÍTA for reeds, grass and the rest; since it is a rule, that a construction of law, established in one case, is also applicable to other cases, unless there be a *sufficient* objection. As an accumulation raising the debt eight fold at the close of one year is declared to be the limit of interest on clarified butter and the rest, so five fold *is the limit* on produce, beasts of burden, and the rest. But, in fact, since there is no law to serve as authority for such an inference, the rate of an eightieth part, and so forth, on produce, *beasts of burden* and the rest, should be received from men of mixed classes, as well as from *Bráhmanas* and the rest. Such is the principal *of the law*.

But, in the case of *Bráhmanas* and the rest, three times, four times, and five times the principal (to be established according to the qualities of the debtor) at the same periods, in which interest may accumulate at the rate of an eightieth part and so forth, so as to double the principal which has been lent to men of mixed classes, and made payable at the time of harvest,

fall under the description of stipulated interest, and are therefore immoral. Not being stipulated in a time of extreme distress, would it not be interest which need not be paid? It might be so; but it would be paid by the debtor, that he may be able to borrow again. Such is the principle *of the law.* In fact, having been settled by many former debtors, it must be *now* paid, though not stipulated in a time of extreme distress; as has been already mentioned. When the borrower himself fixes the rate of interest, then only is it required, *as a condition,* that it should be stipulated in a time of extreme distress.

But Misra expounds the text of Hárítá (44, 2), since "a year" may suggest other periods, such as fifty months and the like, if the principal *lent in kind* be alone considered, it may be doubled or trebled, or, as stated by other Sages, quadrupled or quintupled; the interest is regulated by the price. As an instance of the variation of interest with the difference of price, he adduces the text of Menu (33); and he reads the text of Hárítá (44, 2), grain may be doubled "if the principal *alone* be *considered*" (*mulé*), instead of grain may be doubled "at the time of harvest" (*tulé*).

On this some remark, that with all *debtors* grain is doubled at the time of harvest, that is, when new grain is gathered; by this special rule the rate of an eightieth part and so forth is barred: but interest for one or two months must be regulated by proportionate subdivisions; and the highest interest makes the debt three fold. Such is Hárítá's meaning; and the *apparent* contradiction to the texts of other Sages must be reconciled as before. "So wool and cotton;" interest on these also doubles the principal, and precludes the rate of an eightieth part and so forth. To the question, when *does the principal become doubled?* the Sage replies, "in one year." He subjoins the limit of interest on grass, reeds, and the like; "but grass, &c., may be increased eight fold."

That is not *accurate;* for men of the commercial class and the like would be liable to repay grain doubled at the time of harvest. Thus, were such the rule, a mercantile man, borrowing grain in the month of *Ashhád'ha* to the quantity of a hundred thousand *prast'has,* for the purpose of commerce, would be subject to commercial loss by repaying twice the grain borrowed; which is contrary to reason. But there is no objection to the rule, so far as it concerns men of mixed classes not qualified for trade although unable to subsist by other modes. To establish a different rate of interest on grain, wool and cotton, from that prescribed on all *other* articles, is contrary to reason. Accordingly this gloss is stated in the *Retnácara* on the text of Menu (61); "any such debtor, who has borrowed grain or horses, valued at a hundred pieces of money, on interest at the rate of two in the hundred, &c." At the time of harvest, grain, wool or cotton is doubled; at the expiration of a year, it is only trebled. By the particle "only," the rate of an eightieth part and the like is prohibited. But grass and the rest may be increased eight fold. Although the limits of interest, extending to four and five times the principal, might be reconciled in the same mode, by expounding the text as relating to debtors of mixed classes only, and by distinguishing moral and immoral exactions; yet, not having been stated by any author, this cannot be admitted.

It must, however, be examined how the limits can be regulated on the cheapness or dearness of grain. This difficulty is *thus* reconciled: since it is shewn by the particle "only," in the text of Hárítá ("or trebled only,"

44, 2), that the natural limit of interest is the accumulation which trebles the principal; and since an accumulation raising the debt to four or five times the principal is subordinate thereto; a debt is quadrupled and quintupled in that period only which should *naturally* treble the debt; for, whatever were the value of the grain lent, three times that value is due at the period of repayment: if thrice the quantity of grain be *sufficient*, the grain is trebled; else it is quadrupled: should that also be insufficient, it is quintupled; but if this again be insufficient, MENU forbids any further demand (61). Even though three times the value could be liquidated with twice the quantity of grain in consequence of a great advance in price, double the quantity of grain should not be paid; for no law *authorizes this reduction*.

The qualities of the debtor should be understood of his adherence to his own regular mode of subsistence, his adherence to the modes of subsistence authorized in times of distress, his following the dictates of his own *perverse* will, and so forth. According to the gloss delivered in the *Dípacalicá*, the accumulation depends on the length or shortness of the period elapsed: if the period be sufficient to treble the debt, it is trebled; if the period, in which a debt is increased four fold, be complete, it is quadrupled; if the period be sufficient to make the debt quintuple, it is quintupled. To this very rule of adjustment the *Retnácara* alludes in suggesting distinctions according to the difference of time. Although there be no gloss of authors on the texts of Sages *fully explaining this adjustment*, inferences may be drawn by the wise, through a simple exertion of their own intellect.

A rule of adjustment may be formed on circumstances of *particular* distress affecting the debtor, or on the circumstance of general dearth.

The *Mitácshará*.

To this it may be objected, when are those limits of interest to be admitted according to this opinion? Whether all these modes, sanctioned by very learned authors, should be received, or which should be selected, the wise themselves must determine.

The season of gathering new grain must be extended to wool. But, in fact, interest on grain doubling the principal at the time of harvest, appears to be merely stipulated interest; for it has been stated by CHANDÉSWARA when treating of stipulated interest. This has been already noticed. Accumulation of interest, raising the principal three fold, four fold, or five fold, which are in the nature of limits of interest, must be regulated on the difference of countries. In this province the rates of an eightieth part and so forth occur not in practice on loans of other things than silver coins and the like; but interest on grain and the rest, similar to the stipulated interest described by HÁRÍTA, occurs *in practice*. In such cases, when the debt has long remained *due*, thrice the value is sometimes, and in some places, adjudged by arbitrators. We think the text of NÁREDA (45), as expounded in the *Retnácara*, sufficient authority to maintain local usages.

Some think it a simple construction, that the creditor should receive his principal doubled, trebled, quadrupled, or quintupled, in the order of the classes, from *Bráhmanas* and the rest. This construction is almost *literally* stated in the *Viváda Chintámeni*. It would be vain to offer more numerous interpretations of the text.

In respect of cloth, CÁTYÁYANA ordains that interest shall make the debt double; VRÍHASPATI, treble; YÁJNYAWALCYA, quadruple. The seeming contradictions should be reconciled, as in the case of grain.

67.

VṚIHASPATI:—On pot-herbs the interest may make the debt quintuple; on seeds, and sugar-cane, sextuple; on salt, oil, and spirits, octuple:
2. So on molasses and honey, if the things lent have remained during a long period.

"Seeds;" seed of corn and the like: on that and on sugar-cane, *sextuple.* Interest may make the debt octuple, if the things lent have remained for a long period; that is, for such a period as duly increases the debt eight fold.

68.

CÁTYÁYANA:—For all sorts of oil and spirituous liquors, for measures of clarified butter, for molasses and salt, the interest is held legal, though, *with the principal,* the debt be made octuple.

69.

VṚIHASPATI:—For grass, wood, bricks, thread, and substances from which wine or spirits are extracted, for leaves, bones, *ivory or shells,* and leather, for weapons, *common* flowers and fruits, no interest is ordained *without agreement.*

"Substances, from which wine or spirits are extracted;" *alluding to* a substance from which an inebriating liquor is drawn, and which is commonly named *cut'h.* "Bones;" teeth, conchs and the like. "Leather;" the hide of the black antelope and the like. "Weapons;" arms. The apparent contradiction to the interest specially ordained on flowers and fruits is reconciled by supposing rare flowers and fruits in one instance, and common flowers and fruits in the other. To this gloss the *Retnácara* subjoins the following text.

70.

VISHNU:—On substances from which wine or spirits are made, on cotton-thread, on leather, armour, weapons, bricks, or charcoal, which are not liable to loss, *the interest* may make the debt double.

There the mention of conchs supposes the countries in which they are common: and the same observation may be made on other substances. Since the text of VAŚISHT'HA (66) propounds interest specially ordained and trebling the debt, whence arises an apparent contradiction, therefore the commentator, on the grounds of this text, holds, that interest accrues on rare fruits and flowers, such as nutmegs and cloves, which are meant in the rule of VISHNU; but none on common fruits and flowers, which fall under the general description of "grass, and the like." On cotton, as in the text of CÁTYÁYANA (60), interest makes the debt double; but according to HÁRÍTA it may treble the debt: this is connected with the difference of borrowers; or may be regulated on the commonness or rarity of the thing,

and on the different sorts of cotton, in the same manner with *interest on grain*, or *in proportion to risk*. "Which are not liable to loss;" on which, when lent, interest doubling the principal is not *probably* lost.

But MISRA, citing the text of VRĬHASPATI (69), adds, "this is intended to forbid interest not agreed on, but interest *on these articles* may be promised through the exigency of affairs: accordingly CÁTYÁYANA and VAŚISHT'HA (60 and 66), propound interest doubling and trebling the debt." It is thereby intimated, that on other articles, if it be not specially declared when the debt is contracted, either that it bears interest, or is free of interest, the creditor cannot afterwards receive interest.

BHAVADÉVA reads *tusha* bran or chaff, instead of *ishtacá* bricks; and instead of *cinwa*, a substance from which wine or spirits are extracted, he reads *citta*, which he explains dirt, meaning cow-dung and the like.

Here both opinions (MISRA'S and CHANDÉSWARA'S) seem right: thus, if interest have been promised on anything, however common, it should be paid; and interest on rare things, even though not expressly promised, should be paid, for they are similar to gems, *gold*, and the like. Both inductions are consistent with reason. Where interest accrues, because the articles are acknowledged scarce, on cloves, *fine* cauries, conchs, rhinoceros' horn, stones of great virtue and price, vitreous substances and the like, the limits of interest must either be taken at three times the debt or the like, under the texts of VAŚISHT'HA and others (66, &c.), or at twice the debt, under the general texts of GÓTAMA and others (59, &c).

"Of interest on loans this is the universal and highest rule, &c." (45); this rate of an eightieth part and so forth is universal, for it is prescribed by the law. The *Retnácara*.

And the subject of limited interest is considered in codes of law. But the rate customary in the country may be different; that is, may be contrary to the universal rate. The Sage describes customary rates (45, 2); "country" is there a mere instance, suggesting usage founded on seasons, on difference of class, and so forth. "Double, treble," and the like, are mere examples; more or less therefore are comprehended in the text. This text is accordingly cited as authority to prove special interest payable by debtors of mixed classes, as stated in the *Retnácara*. In some provinces the principal is either repaid with interest amounting to half the principal, or is doubled, in others *the usual interest is different*.

If the borrower, being distressed, promised stipulated interest, when he received the loan, at six or seven in the hundred, his debt is doubled in a few days more than sixteen months; after that period, does interest stop, or does it continue to the end of fifty months? It is answered, since the law does not authorize more than double the principal, interest then ceases. It is not solely when the rate of interest is the eightieth part of the principal, that the debt can be only doubled; but when a higher rate of interest is settled, may not so much be taken as is the accumulation of interest in fifty months; else stipulated interest and the like would not exceed the rate prescribed by law? Interest on a debt secured by a pledge is declared to run six years and eight months, because the principal may be doubled in that time; *on the above supposition*, a loan, for which neither pledge nor surety had been received, would also bear interest for the same period, and Sages would hold that it might be trebled or quadrupled: for what purpose then has it been declared, that interest ceases after fifty months. Consequently, no particular period is fixed for the cessation of interest, since fifty months and eighty months

would be mutually contradictory: but on such and such substances lent, such and such accumulation of interest is limited. Thus the whole *law* is consistent.

Again; if a debt have been contracted on a pledge given, and by the casual loss of the pledge the debt become unsecured by pledge or surety, in that case also interest should be taken so long as twice the principal have not been received by the creditor; but, after that *has been received*, interest ceases. It is evident, that stipulated interest and the rest may exceed the interest allowed by law, if the debt be discharged, *in the case proposed*, within sixteen months.

ART. III.—*On Debts bearing no Interest.*

71.

NÁREDA:—A commodity, the price *of a commodity*, wages, a deposit and *the like*, a fine to *the king*, a thing clandestinely taken *without a design to steal it*, a thing idly promised, and a stake played for, carry no interest *before demand* without a special agreement.(43)

The text is read *panya múlyam*, the price of a commodity sold: *but*, a commodity purchased, *and not received*, falls under the description of a deposit. On the other reading, *panyam múlyam*, the sense is, a commodity sold *but not delivered*, and the price *of a commodity purchased but not received*. Thus, if a thing sold happen to remain with the first owner, it carries no interest without a special agreement. "Wages;" hire. "A deposit;" a bailment. Interest after six months on the price of a commodity, and on a deposit not delivered after a demand (56), has been already declared; therefore interest is only prohibited before a demand. More on this subject should be stated in the Chapter on Deposits.

"A fine," such as the highest amercement and the rest. "A thing clandestinely taken;" obtained by fraud and the like. The *Retnácara*.

For instance, one has received money from another, pretending that he will deliver him from some present or future danger of oppression by the prince; but afterwards, the condition being broken, either by non-performance of his undertaking, or because the danger was merely pretended, and repayment of the money being therefore required, it need not be paid with interest. Again; a hundred pieces of money have been extorted by some rogue, threatening a man of substance to accuse him of a crime before the prince or his kindred, unless he gives him a hundred pieces of money; in that case they must be received back without interest. Such cases are meant by the expression, "obtained by fraud or the like."

"A thing idly given or promised," given on no religious consideration,

(43) In the case of *Dada bhaee Ruttunjee* v. *Joseph Nimmo*, the Court of Sadr Dewanny Adalat at Bombay had decided, that, by the custom of Surat, a creditor is not at liberty to charge interest until two months after delivery of the goods, whether interest were stipulated for or not; and if the goods be paid for within that time, a charge of interest will not be allowed. (2 Borr., 339). But, interest at the rate of six per cent. was allowed upon an account stated, which was made payable by instalments on certain days. EAST'S NOTES, Case 28, note.—EDITOR.

and not delivered. From the term "idly" it appears to be the Sage's meaning, that, if a gift made on a religious account be not forthwith delivered, interest ought to be paid at the rate prescribed by law: since it is declared by a text cited in the *Malamása tatwa* to be a theft, when gold, *given but* not delivered, is lost. If it be lost through *slight* negligence, so much only *as is its value* must *the giver* make good; but, if gold, *given but* not delivered, be lost and *not made good*, the giver would be guilty of theft. By parity of reasoning, if it be not lost, it must bear interest *so long as it is withheld*. It should not be objected, that this concerns gold alone. The theft is not denied in the case of other articles; or, supposing it to concern gold alone, the term "idly" must likewise except the case of gold only. However, interest is not now paid, any more than on amicable loans.

Some man of substance, in a time of distress, or when going to a foreign country, distributes his property; for instance, *he assigns* certain hundred *suvernas* to his spiritual preceptor, *consecrates* eighty *suvernas* to a certain deity, *assigns* sixty *suvernas* to a certain priest, thirty *suvernas* to a certain dancer, five *suvernas* to a courtesan formerly enjoyed, and distributes the remainder of his property in due shares *according to the law of succession*: but, from the pressure of affairs, the sums given away have not been delivered. In that case, when he happens to be relieved from that distress, or when he returns from abroad, and interest is proposed on those gifts as debts demandable on his aggregate wealth, the sums given on religious considerations must be delivered with interest, but the principal only of the sums given to dancers and the like should be paid. This also some lawyers hold *to be intended by the text*.

"A stake played for;" money won in gaming. "Without a special agreement;" not expressly declared by both parties to bear interest. "Carry no interest;" do not bear interest.

Some person, having sold a thing, tells the purchaser, "Let this your property be a loan to me; I will pay interest for it." Or an indigent person employing a servant on necessary work, but unable to pay his wages, tells him, "I will borrow money elsewhere and pay thy wages; or let them be *forborne*, and I will pay thy wages with interest." In such cases of positive agreement, there may be interest promised on a commodity sold, on wages and the rest: and then only is interest due. But, if there be no such agreement for interest, this text is intended to forbid interest in that case.

1st, If anything be given by some person to another as a loan, as a complimentary present and the like, or as a gift on a religious consideration, and by reason of the donee's absence it be committed to another, and long after received by the donee, it seems to be similar to a deposit: does, or does it not bear interest while remaining in the hands of the intermediate person? This is one doubt *which may be proposed*. 2dly, *In the case of sale without ownership*, the buyer is justified by producing the seller, and the owner recovers his property (Book II, Chap. II, v. 29): when the owner recovers his property after the lapse of a long period, must, or must not, interest be paid? This is a second doubt *which might be proposed*. 3dly, Some money has been obtained for the king or his officer, from some person accused of a crime; afterwards, the accusation being disproved, the money must be refunded by the king or his officer; or if it be true in forensick practice, that it should be made good by the accuser, must, or must not, interest be paid thereon? This is a third doubt *which might be proposed*.

On the first doubt,

72.

SAMVERTA:—There shall be no interest on the property of women *lent amicably by them to their kinsmen,* nor on interest itself, nor on a deposit, *nor on anything* so committed *in trust,* nor on a sum which is dubious *or unliquidated,* nor on a sum due by a surety, unless it be mutually stipulated.

"Committed;" placed with an intermediate person.

SÚLAPÁNI in the *Dípacalicá.*

This text is found in the treatise of YÁJNYAWALCYA, but its insertion there is not approved by SÚLAPÁNI and others.

"On a deposit so committed;" *or so remaining with the depositary:* not detained after a demand. The *Retnácara.*

Thus a thing committed to an intermediate person is merely a sort of deposit: and "committed" is an epithet of deposit; else the circumstance of its not being detained after a demand would be unmeaning, since interest is not ordained on a thing committed *in trust,* after the lapse of six months: but even on a thing so committed, and not restored on demand, interest accrues after a demand at the expiration of six months. But if the word deposit be there taken in a general sense, it is proper to do the same also in the present instance (*that is, allow interest after the lapse of six months if the thing have been demanded*).

But how can interest be allowed in that case after the lapse of six months, according to the interpretation of SÚLAPÁNI? It is answered, the word "and" in the text of CÁTYÁYANA (56, 2) connects *the sentence* with what is not mentioned. More on this subject we shall deliver in the Chapter on Deposits.

"On the property of women," as described of six sorts: *on such property* taken by their *husbands or other* protectors, there shall be no interest.

The *Retnácara.*

Here "protector" is a general term comprehending sons and the rest. CÁTYÁYANA propounds a distinction.

73.

CÁTYÁYANA:—Neither the husband, nor the son, nor the father, nor the brothers, have power to use or to aliene the legal property of women.

2. If any one of them shall consume the property of a woman against her consent, he shall be compelled to pay *its value with* interest *to her,* and shall also pay a fine to the king.

3. But, if he consume it with her assent, after an amicable transaction, he shall pay the principal only, when he has wealth *enough* to restore it.*

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* Book V, Chap. IX.

By the expression "against her consent," or forcibly, unamicable transactions *are* suggested: consequently, should he consume her property not amicably lent to him, interest must necessarily be paid; but there is no interest on the property of a woman amicably lent *to a kinsman.* The text of SAMVERTA must be applied to that case only. From the term "protector" used in the *Retnácara*, *it appears* that interest must only be paid by others than her husband, her son, her father, or her brother. For in the third verse of CÁTYÁYANA an agent must be sought for the act of consuming her property after an amicable transaction, and that agent occurs in the preceding verse (73, 2), "any one of them." A daughter, a mother, and a sister are entitled to borrow the several property of a woman on amicable terms, without interest; for the affinity is the same, the *considerations of* duty the same, and natural affection the same. But interest must be paid by the husband's father or mother. Yet, what objection there could be to place the father-in-law and the rest on the same footing with a brother, must be determined by the wise.

On this subject some affirm, that the phrase "neither the father nor the brother" intends the father's lineage generally: "neither the husband nor the son" intends the husband's lineage generally: and the same should be argued in respect of the mother's family. When it has been expressly declared by the woman, at the time the loan was made, that no interest should be paid, in that case none need be paid by any person. The phrase "when he has wealth *enough* to restore it" intimates, that the property of a woman borrowed by a kinsman involved in distress, must only be paid when he is relieved from distress.

The term "property of women," in the text of SAMVERTA above cited (72), has been already expounded. *He proceeds,* nor on interest:" here also the circumstance supposed in the case of a deposit must be understood, "not detained after a demand;" for it is declared, that the balance of interest bears interest (56, 2). But *this can only be claimed* after the principal has been discharged. Accordingly BHAVADÉVA says, "the balance of interest on a sum paid."

In the second doubt proposed, is it questioned whether interest shall be paid for so long a period as the thing remained in the thief's possession, with or without the knowledge of the owner, before it was adjudged; or whether it shall be paid for the period during which the thing remains unrestored through the wiles of the thief, after the owner's property has been adjudged in a judicial proceeding or the like? As to the first supposition, it is provided in the text of SAMVERTA (72), "nor *any interest* on a sum which is dubious *or unliquidated,* nor on a sum due by a surety, unless it be mutually stipulated."

"A sum which is dubious or unliquidated;" of which it was first questioned whether it were due or not: *on such a sum,* even though subsequently adjudged to be due, there is no interest. The *Retnácara.*

But if it be adjudged to have been originally not due, of course there can be no interest; *for the greater includes the less,* as the staff *is impure if it can defile* the bread.

In fact, the construction of the text (Book II, Chap. II, v. 29) gives this *sense,* "the buyer is justified by producing the seller, and the owner recovers his property by the production of the seller." Before the seller or thief be produced, the owner's property is not revived. Accordingly RAGHUNANDANA,

in the *Práyaschitta tatwa*, says, "the owner of property lost." If his property subsisted at that time also, the gloss, "owner of lost property," would be irrelevant. If a stolen bull be sold to a YAVANA, and castrated by him, or the like, expiation must be performed *by the owner*, on account of some negligence *which gave opportunity for the robbery*.

The production of the seller is proof which justifies the buyer by establishing the sale; the owner recovers his property by the detection of the theft. Thus the buyer is justified by producing the seller for proof of the sale; and the owner recovers his property by proof of the theft. Hence the owner has not *actual* property, even while the cause is pending. Or if the text be explained, "from him by whom the thing was sold, the owner recovers his property, the king receives a fine, and the buyer receives the price," still the owner's property is only revived on the restoration of the thing by the thief or other person; and it is only restored after the judicial proceeding. Accordingly it is declared by a text of the *Vishnu dhermottera* (Book II, Chap. II, v. 32), that theft creates property: hence, if such property be lent, the robber may receive interest; and some benefit may arise from such *stolen* goods applied to religious uses.

VÁCHESPÁTI BHATTÁCHÁRYA admits the robber's property in stolen goods. According to his opinion, the import of SAMVERTA's expression, "what is dubious," is thus stated: a man requested by another to give him a silver coin, and thinking that he asks it as a loan, gives the money by way of loan; but he who receives it entertains a doubt, "I have done him a benefit; he is a friend, and is rich; does he give me this money for consumption, or does he lend it to me?" The matter being afterwards contested, interest, even though it be adjudged to be payable, need not be paid for the period preceding that *adjudication*.

Some hold, that, by saying "the owner recovers his property," his ownership is fully established. The gloss, "owner of lost property," is intended to indicate the former owner, as a solution of the doubt, whether ownership was then vested in the buyer, or in the former owner: it signifies him whose property was missing; who did not exactly know where his chattel was. If a stolen bull be castrated, or the like, the owner must perform penance to expiate his want of sufficient care. Accordingly in the *Práyaschitta Vivéca*, after describing as theft the act of one who resolves to dispose at his pleasure of what he well knows to be the property of another, SÚLAPÁNI says, a robber has not property in stolen goods. Hence a sale made by him, being a sale without ownership, is invalid; and YÁJNYAWALCYA's expression, "the owner recovers his property," is accurate.

On the second case of the second doubt (*does it bear interest after adjudication?*) it is said, there can be no opportunity for fraudulent detention, since the king immediately compels restoration of the chattel. But if a long period elapse in consequence of inability *to enforce the demand* or the like, then, since the man is guilty of an offence, and the case is not specified under the title of Prohibited Interest, therefore interest must be paid; and since no particular period is directed under the head of Interest without a special Agreement, it is proper that interest should commence from the date of the demand. This might be further discussed under the title of Theft.

"Nor *any interest* on a sum due by a surety" (72); *literally for suretyship:* the act of a surety is suretyship, as the act of a thief is theft: and that *act of a surety* is *an undertaking* for *the* payment *of a debt*. Thus,

if a debtor die, or be reduced to the utmost poverty, the debt, with the interest *which has accrued*, must be paid by the surety. In that case the whole amount of principal and interest due by the *original* debtor is the same with the principal due by the surety; for he cannot be solely liable for the original debt. The text of SAMVERTA resolves the doubt, whether the surety must give further interest if he delay payment.

74.

CÁTYÁYANA:—No interest is ever *due* on leather, on *straw or* produce, on the intoxicating liquor called *ásava*, on a stake played for, on the price of commodities, on a woman's fee nor on what is due on account of suretiship.

"On leather" interest is only forbidden without a special agreement; or on common leather: for the rule of VISHNU (70) ordains interest on leather, making the debt double. "Straw *or produce* (*sasya*); the stems of corn. In respect to this also the rule is similar. "The intoxicating liquor called *ásava*;" a particular sort of wine. Interest on *ásava* or spirituous liquors has been propounded by CÁTYÁYANA and VRĬHASPATI (68 and 67): although this might be restricted to other kinds of inebriating liquors except *ásava*, yet as the word "all" in the text of CÁTYÁYANA (68) must be extended to spirituous liquors, interest on all sorts of inebriating liquors, *ásava* and the rest, is *thereby* suggested. Hence the adjustment must be the same as in the case of leather.

"A woman's fee;" a nuptial gift payable on an *Asura* marriage, and so forth: a gratuity payable to a courtesan, or the like, falls under the description of things given on a false *or immoral* consideration, as stated by NÁREDA (71). "What is due on account of suretiship;" what is become due from a bondsman on account of his suretiship."

It is here implied, that no interest is due on leather and the rest, without a special agreement. The *Retnácara.*

The use of this reservation, "without a special agreement," has been explained in respect of leather, straw or produce, and *ásava*. In respect of a stake played for, the price of a commodity, and a woman's fee, it is founded on the coincidence of the text of NÁREDA (71); and in respect of what is due on account of suretiship, on its coincidence with the text of SAMVERTA (72), "nor *any interest* on a sum due by a surety, unless it be mutually stipulated." Here the inferrible sense is, that common leather and the rest, on which interest had not been stipulated, do not, like deposits and the rest, carry interest, even though withheld after a demand.

CÁTYÁYANA and SAMVERTA (74 and 72) prohibit interest generally on a sum due by a surety; if a debtor die, his surety being therefore liable for payment, would he not be liable for the payment of the principal only without interest? On this objection VYÁSA propounds a rule concerning interest upon the original sum lent.

75.

VYÁSA:—A sum, for which a man is *merely* a surety, a sum secured by a pledge *to be kept only yet* used, a debt not received from a debtor

tendering it, part of a loan remaining in the hands of the creditor, a fine imposed, a nuptial gift, and a sum *only* promised, carry no interest.

On a sum for which a man is merely a surety he shall pay interest only to the amount of double the principal: it is not again doubled while due by the surety. MISRA.

A sum secured by a pledge to be kept only yet used, bears no interest; for in the case of using a pledge which may be used, the use of the pledge is interest; and in the case of the unauthorized use of a pledge liable to be used, half the interest only is forfeited, as will be shown. It is accordingly declared by YÁJNYAWALCYA, "there shall be no interest if a pledge for custody only be used" (84.)

"A debt not received *by the creditor* from a debtor tendering it;" thus a debtor offers payment within two or three months after the receipt of the loan, but the creditor refuses *to accept* payment; in such a case the sum bears no *further* interest.

76.

YÁJNYAWALCYA:—Property lent, which the creditor will not receive back, when tendered, must be deposited with a third person, and bears no interest afterwards.

A sum tendered by the debtor, which the creditor will not receive, bears no interest afterwards, provided it be deposited with a third person.

The *Dípacalicá.*

Consequently, if the debtor wishes to pay no further interest, he must place in the hands of a third person the debt *tendered by him and* refused by the creditor: unless it be so deposited with a third person, it carries interest. Accordingly CHANDÉSWARA cites the text of YÁJNYAWALCYA with this remark, "a debt not received from a debtor tendering it carries no interest: on this subject the Sage declares a *provisional* condition:" here the condition is, that the sum be deposited with a third person. In the text of VYÁSA also (75), concerning a debt not received from a debtor tendering it, a bailment to a third person must be understood; for it has the same import with the text of YÁJNYAWALCYA.

77.

VISHNU:—Property lent bears no further interest after it has been tendered, but refused by the creditor.

Here also the condition, that it be deposited with a third person, should be understood; and it must be admitted by the followers of CHANDÉSWARA, that this concerns a debt contracted for no specifick period; else the limitation, "let no lender receive interest beyond the year" (41), would be irrelevant *to the cases supposed by* CHANDÉSWARA. It should not be affirmed, that the text may be thus applied, "receiving the principal within the period, let him take interest to the end of the period stipulated." If no interest be received even though the debt remain, it is an ill construction that interest can be received when no debt is due. According to other opinions, the same rule should be understood even in the case of a loan for a specifick period. A distinction, however, will be mentioned in respect of loans for a specifick period secured by a pledge.

"Part of a loan remaining in the hands of the creditor" (75); the term is expounded in the *Retnácara*, what is under the influence of the creditor. This gloss may also be explained in the form of apposition called *bahubríhi;* that of which the creditor is influenced. A creditor is influenced by the humble solicitations of the debtor; thus, if a creditor, influenced by great submission and the like, say, "henceforward I will exact no interest," then the debt carries no interest. It is the same if the apposition be in the form called *tatpurusha.*

"A fine" (75): *a mulct,* such as the highest amercement and the rest. Although paid after long delay, it carries no interest.

"A nuptial gift" (75) which is promised, or undertaken to be paid.

The *Retnácara.*

The commentator considers "promised" as an epithet of "nuptial gift."

"A nuptial gift;" money due on account of marriage. "A sum promised;" undertaken to be paid: and this concerns a thing given on a false *or immoral* consideration, for it is easy to suppose the same grounds for this and for the text of NÁREDA, which has that import (71).

The *Chintámeni.*

The commentator considers "promised" as an independent term. Ultimately there is no difference; for, since the donee has no property in a thing promised, there can be no interest. But it may be questioned, why it is said in the *Chintámeni,* "this concerns a thing given on a false *or immoral* consideration." In the gloss of the *Retnácara* also "nuptial gift" assumed as the subject, of which "promised" is the epithet, is liable to objections; for in other cases of things only promised there is no interest. Some expound the text, "a nuptial gift and a sum *only* promised bear no interest." Promised; that is, promised to be given. It should not be affirmed, that a sum promised as a gift on some religious consideration, must be paid with interest. It could only be right to affirm it, if there were an express law of such import.

VISHNU also declares exemption from interest, if a pledge be used.

78.

VISHNU:—By the use of a pledge *to be kept only,* the interest is forfeited.

"By the use of a pledge;" by the use of a pledge to be kept only.

The *Retnácara.*

By the use of a pledge to be kept only, such as a copper caldron and the like. If a pledge for custody only be used a single day, must interest be paid or not? The answer to this question is, it does not follow from the text, that interest need not be paid, if the pledge be used even a single day; for that would be inconsistent with reason: and there is no difficulty in explaining the text, "by such use of a pledge as is equivalent to the whole interest." Consequently the proportion of interest should be settled after deducting a sum equivalent to the use of the pledge. This answer may be given.

Such being the case, if the use of the pledge be more *than equal to the principal and interest,* would not the principal be forfeited? It may be so: and YÁJNYAWALCYA accordingly says, "the pledge must be released on the

double sum being paid, or having been received from the use of a pledge" (46). Else, since VISHNU propounds the forfeiture of interest only by the use of a pledge, the principal must be paid. With so much as has been received, according to the value settled by arbitrators for the hire of the pledge, such as the price of milk or the like, or the waste of copper vessels, and so forth, the interest is in the first instance discharged; if there be an excess, it is applicable to the liquidation of the principal. This form of adjustment should be observed in the present case.

The moderns so expound the law. But the *Mitácshára* states, that by the use of a pledge, however inconsiderable, interest is forfeited, however great, because the pledgee has violated the terms of the agreement. The question on the difference of these two opinions must be determined according to reason.

Some money has been intrusted by one man to another, and is delivered by the depositary, with or without the consent of the owner, to another person, by way of loan: in that case, to whom does interest accrue; to the depositary, or to the owner? This question will be discussed in the Chapter on Deposits; but it may be here examined, what is the rule when the depositary himself uses the money as a loan.

It is used as a loan with, or without, the assent of the owner? If used without his assent, was it done on the presumption of assent, or without such presumption? The first case occurs in the following instance: a thing was first deposited with some person; afterwards the depositary, needing a loan for the support of his family, asks the loan of the depositor. In that case, the loan authorized by him is alone valid; for, in comparison with a loan, a bailment, consisting in *an agreement for* custody only, is a weaker contract. This may be explained when examining the comparative force of civil contracts. Hence *(since the loan prevails over the deposit)* the principal must be repaid with interest, unless there be a special agreement to exempt it from interest. The second case occurs when such a depositary needing a loan, and confidently presuming on the tacit assent of the owner, either on account of his indolence, or his remote absence, publicly executes a written contract of debt, and expends the money. This also becomes a debt, but secondary *only*; for it is not delivered *as a loan* by the owner: if the first method can be observed, the last should not be practised. In the present case, the principal must also be repaid with interest: if the owner of his own accord relinquish interest, then only can the principal be repaid without interest.

The form of repayment in either case is this; what became a debt with the assent of the owner, must be repaid to the owner himself, and interest must be paid for the intermediate period. If the owner again make it a deposit, then only does it become a deposit. But if the owner, when assenting to the loan, said, "when you receive money, discharge the debt, and keep the money in your possession; my consent is not requisite:" in that case, the borrower should publickly execute a written declaration of payment, with an acknowledgment of his holding the sum as a deposit, and lodge the money in a place of safety: from that moment interest stops.

But, in the case of tacit assent, such assent is also presumed when the debt is paid. This is founded on the less degree of confidence in the former case, and the greater degree of confidence in the last case. If the depositary said, when the deposit was made, "I shall sometimes use this as a loan, sometimes lend it to persons who may ask a loan, sometimes keep it:" in that

case, whatever the owner may have authorized, such only must be the proceeding *of the depositary*; for, if the owner said, "it must only be lent and repaid with my knowledge," in that case it can only be repaid with his assent; and interest must be paid until that assent be given. But if he said, "the loan may be advanced and repaid according to your judgment of what is right; there is no occasion for my *special* consent:" in this case, the depositary may, of his own authority, discharge the debt, or receive payment from another person, to whom the money has been lent. In the interval between the payment of one debt, and the contract for another, interest is suspended: should the proprietor subsequently claim interest until he consented to repayment, he shall not obtain it. If the owner said, "it must not be lent, nor otherwise employed," the depositary is guilty of an offence if he use it as a loan. Should he do so in breach of such an injunction, then interest at legal rates, to which the depositary has tacitly assented, must be paid, until the owner consent to repayment.

The third case occurs, when a depositary expends the money, unknown to the proprietor, and executes no writing declaratory of debt. This is an offence, and should be discussed under the title of Theft. Although there be no text of any Sage, nor commentary of any Author, on this subject, it appears so from the reason of the thing. Thus,

VRĬHASPATI,* cited in the *Vyavahára tatwa*:—A decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of the law, or according to immemorial usage (for the word *yucti* admits both senses), there might be a failure of justice.

Yucti; ratiocination. RAGHUNANDANA.

79.

GÓTAMA:—A loan secured by a pledge, *to be kept only, yet* used, bears no interest, nor money tendered, nor a sum, *of which part is undelivered by the lender, or* of which he disturbs the possession.

"Money tendered;" the term may signify a debtor willing to pay the debt. "Of which he disturbs the possession;" the pledge for which *debt* he attaches in the hands of the creditor. In such a case the loan carries no interest. For example, a debtor is willing to pay the debt, but the creditor refuses to accept payment; the debtor deposits the sum with a third person, and attaches the pledge: in this case the loan bears no interest; because he has attached the pledge, interest ceases: but if he attach a pledge which is liable to be used, without tendering the debt, interest must be paid; and not, if he tendered the debt. The text of GÓTAMA suggests this distinction.†

Some explain the text, when the king, on the application of some creditor of that creditor, attaches the debt in the hands of the debtor, and makes it as it were a deposit in his hands, no interest shall in that case be paid. Others say the meaning is, when the person of the debtor is attached by the

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* Book II, Ch. IV, v. 17.

† A subsequent gloss, more consistent with the literal sense of the text, is followed in the translation.

creditor to enforce payment of the debt; when he is restrained from going where he lists; when he is confined in prison, and so forth, as stated in texts which will be quoted: in such cases the debt carries no interest during the period of restraint.

A loan secured by a pledge to be kept only, yet used, bears no interest. By one who has tendered the money, no interest is payable. By a debtor who is disturbed in the use of the loan received, no interest shall be paid from the time of disturbance. The *Retnácara*.

No interest is payable, provided the sum be deposited with a third person; this must be supplied, for it coincides with the text of YÁJNYAWALCYA.

"He states another case:" that is, when a creditor has granted a loan of a hundred *suvernas* deposited in the hands of a banker, and the whole sum has not been taken by the debtor, but a few *suvernas* only, and the remainder left with the same banker; afterwards, the creditor discovering his insolvency, and apprehending that the debt would not be discharged, attaches the money in the banker's hands. In such a case, the whole sum carries interest until the attachment; but after the attachment, so much only as has been received, and not the whole sum. Or *the other case alluded to may be*, when money deposited sometimes becomes a loan in the mode above-mentioned, and the creditor in such a case attaches *the deposit, and insists on immediate payment*. Again, a man has lent a horse or the like to be used for burden; after two or three months the creditor, through *other* persons, forbids the use *of the cattle*: it happens that the horse, or other beast, is *only* restored two months afterwards. In such a case, interest must be paid until *the use of the cattle was* forbidden, but not later; and no hire shall be paid for the horse, since he was originally received as a loan. Such is the opinion intimated in the *Retnácara*. According to the gloss of MISRA, "a loan bears no interest, if it be attached, *withheld*, or the like."

Of these interpretations one may be considered as the true sense of the text, and the rest as founded on the reason of the law. Or all may be considered as intended by the text, expounding it equivocally. But, *at all events*, the several inductions must be admitted.

CHAP. III.

ON

PLEDGES, HYPOTHECATION,

AND

MORTGAGES.

Sect. I.—*On the nature of a Pledge, and on Pledges lost or damaged.*(44)

80.

Vṛihaspati:—A pledge (*ádhi*) is called *bandha*, and is declared to be divisible into four *pairs:*

2. Moveable, *or personal,* and fixed, *or real;* for custody only, and for use; unlimited, and limited as to time; with a written contract, and with a verbal attested agreement.

Bandha is derived in the passive form, "that which is bound *or pledged* (*badhyaté*)." A male slave, or the like, being bound or confined, is then unable to perform service for his master; a horse also, being bound or tied, is then unfit for his owner's use. By acceptation, the sense of the word

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(44) A thing is said to be pledged to an individual when it is made a security for some debt or demand. The *Roman* Law drew a distinction between a *Pledge* properly so called, and a *Mortgage*. The former was called *Pignus*, in which case possession of the thing was given to the person to whom it was made a security; and the latter *Hypothecatio*, wherein the thing was assigned as a security, without being put in possession. (*Dig.* 13, *tit.* 7, s. 9.)

In cases where the thing pledged or given for security is *moveable*, it is desirable, no doubt, that the same should be put into the custody of the lender or creditor; otherwise, it might be removed or destroyed, and so not answer the end for which it was assigned. Puffendorf is of opinion that this way of mortgage is very useful among subjects of the same state: for it being absolutely necessary that they should frequently borrow one of another, and as necessary that the payment should sometimes be put off for a considerable time, there would not be *moveables* enough for sufficient security: and it would be too hard to oblige the borrowers immediately to part with their *immoveables*, such as their houses or lands. It may, therefore, be sufficient to assign such *immoveables* for security, which cannot be taken away, and of which the Law at any time can give possession.

Bailment is another topic which is treated by Jagannatha in the present Chapter: it will be seen that he has discussed the subject in all its bearings, almost to exhaustion. Sir William Jones divides Bailment into five species; which he enumerates and defines as follows:

"*bandha*" is a thing remaining in the creditor's possession by an agreement on the part of the debtor, in this form, "this *chattel* shall remain in thy possession so long as I do not repay thy money." Accordingly it is said by eminent logicians, *that the meaning of* words *is* apprehended by grammar, by analogy, by dictionaries, by *original* instruction, and by practice or acceptation.

A'dhi is the very same thing with *bandha.* It is divisible into four *pairs:* it is of four kinds or forms, *which are again subdivided.* Those forms are the properties *of a pledge,* considered by the author of the *Clapateru* as connected with the nature of the thing *pledged,* the form *of hypothecation,* its period, and *the* evidence *of the transaction.* Of how many sorts again are each of these properties *of a pledge?* The Sage, satisfying that question, enumerates them; "moveable, &c." (80, 2). Consequently, in regard to its nature, a pledge is of two sorts; moveable, as kine, horses, or the like; and fixed, as land, or the like.

Having explained the *distinctions on the* nature *of the pledge,* the Sage notices the form: "for custody only, and for use; for custody, or safe-guard, and for use, or employment. These two direct the properest (*pracrïshta*) conduct of the creditor, and hence are called the forms (*pracára*) *of a pledge:* and thus, in respect of form, a pledge is of two kinds. "A pledge for custody only;" to be merely kept: a thing which may be injured by use, or one which cannot be used. That which is not *probably* injured by use, is a pledge "for use:" as will be explained further on.

The Sage subjoins *the distinctions* respecting the period of the pledge; "unlimited and limited." "Unlimited;" *literally* subject *to redemption* at pleasure; that is, to be released at no specific time. "Limited;" to be released at a specifick time. On payment of the principal at such a time, this *pledge* shall be released;" in this and similar forms a period is specified. Thus the distinction in respect of time is also two-fold.

The Sage notices the evidence of a pledge: "with a written contract, and with a verbal attested agreement." If it be questioned, whether "this horse be pledged to that man or not," the evidence may be a writing or a witness. Thus evidence is also two-fold. Hence the distinction are eight-fold, as is observed by CHANDÉSWARA.

Being divided into four pairs, moveable or fixed, and so forth, it is of four kinds: four-fold, distinguished according to the nature of the thing

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1. *Depositum,* which is a naked bailment, without reward, of goods to be kept for the bailor.

2. *Mandatum,* or *Commission;* when the mandatary undertakes, without recompence, to *do some act* about the things bailed, or simply to *carry* them; and hence SIR HENRY FINCH divides bailment into *two* sorts, to *keep* and to *employ.* (LAW *b.* 2, *ch.* 18.)

3. *Commodatum,* or *loan for use;* when goods are bailed, without pay, to be *used* for a certain time by the bailee.

4. *Pignori acceptum;* when a thing is bailed by a debtor to his creditor in *pledge,* or as a security for the debt.

5. *Locatum,* or *hiring;* which is always for a *reward;* and this bailment is either, (1) *locatiorei* by which the hirer gains the temporary use of *the thing: or,* (2) *locatio operis faciendi,* when *work* and *labour,* or *care* and *pains,* are to be performed or bestowed on the thing delivered: or, (3) *locatio operis mercium vehendarum,* when goods are bailed for the purpose of being *carried* from place to place, either to a *public* carrier, or to a *private* person ("Essay on the Law of Bailments." Works, vol. VIII, p. 362.)

The reader cannot fail noticing the analogy in many respects of the Law of the *Hindus,* with the general principles of Legislation among other Nations.—EDITOR.

pledged, the form of *hypothecation*, its period, and the evidence of the transaction: and eight-fold, by the subdivision of these. The author of the *Calpateru*.

Moveable and fixed compose the first pair relative to the nature of the thing *pledged;* for custody only, and for use, the second pair relative to the form *of hypothecation ;* unlimited, and limited *as to time*, the third pair relative to the period *of the mortgage ;* with a written contract, and with a verbal attested agreement, the fourth pair relative to the evidence *of the transaction.* By the sub-division of these, by their mutual differences, by the relative distinctions of moveable and fixed, and so forth, the subject becomes eight-fold: consequently, each of the four sorts contains two species.

The enjoyment of the pledge, and the debtor *himself*, and so forth, are secondary evidence of hypothecation proved by enjoyment, or made by the party himself *without writing or attestation.* They are not consequently exclusive of this subdivision. Or these are the distinctions of pledge, as approved by law. But a pledge unauthenticated by attestation or written contract, or authenticated by an attested writing not being noticed in codes of law, is not approved by *positive* law. Such is the interpretation according to CHANDÉSWARA.

Or a pledge, whether moveable or immoveable, is of four sorts; to be merely kept, to be used, redeemable at pleasure, or at a specified time. This four-fold distinction *of pledges* concerns moveable *property*, and *also concerns* fixed *property.* A pledge is sometimes authenticated by a written contract, sometimes by a verbal attested agreement. Such may be the construction *of the text.* This is stated generally: sometimes also a pledge is proved by enjoyment, or has been delivered with a verbal unattested agreement.

81.

NÁREDA:—That, to which a *Secondary* title is given (*adhicriyaté*), is (*ádhi*) a pledge.

2. It has two forms, to be released at a fixed time, or to be retained until payment be tendered. It is again declared to be of two sorts, for custody only, and for use.

3. Even so must it be diligently kept: on its loss or destruction by the negligence of the lender, the interest *on his loan* is forfeited; and even if it be only spoiled or altered.

It has two characters or forms. *One*, to be released, or given up, at the period which has been fixed or settled. For example: *the pledger says*, "a loan has been received from you on the mortgage of this land; when twice the amount of the debt has been realized, you must surrender the mortgage." Or *he says*, "a loan is now received by me, and a pledge is given; paying the debt at the close of the year, I will redeem the pledge, else this pledge shall become your absolute property." When a time has been settled in these or other forms, the pledge is "to be released at a fixed time." This has been named, by VRĬHASPATI, a pledge "limited as to time."

The sense of the *other* phrase completed is, "until the time of payment *tendered*;" until payment be tendered. In the case of an agreement in this form, "whenever the debt shall be discharged, then only shall the pledge be released," it is a pledge for no specific period; and this is named by VRĬHASPATI a pledge "unlimited as to time," or redeemable at pleasure; for the payment of the debt and surrendry of the pledge depend on the will of the party.

"It is again declared to be of two sorts" (81, 2); the two kinds being subdivided, the distinction is four-fold. But CHANDÉSWARA thus expounds "two forms" (81, 1); a pledge, whether fixed or moveable, is unlimited or limited as to time, *a distinction described by the phrase* "to be released at a fixed time, or to be retained until payment be tendered;" and it is for custody only, or for use: these are the two distinctions. It must also be understood, that it may be authenticated by a written contract, or by a verbal attested agreement.

Thus the texts of VRĬHASPATI and NÁREDA coincide. According to this interpretation, it is proper to expound the phrase "it is again of two sorts," with a written contract or with an attested verbal agreement. Here the text of NÁREDA is expounded in conformity with the text of VRĬHASPATI; or the text of VRĬHASPATI may be expounded in conformity with the text of NÁREDA. Ultimately there is no difference. *

"That to which a title is given" (81, 1); that which is made similar to his own absolute property. In this instance there is only a secondary title, consisting in the custody or occupation of another's property. As that to which a man is entitled is kept or used like his own property, so is a thing received in the form of a pledge, though it actually belong to another: and the word *ádhi* acquires the same meaning with *bandha* from practice and use. Or the derivation of the word *ádhi* may be, that in right of which (*adhicrĭtya*) a loan is made or the like. It may be any-how understood *by supposing the intervention of some term*, as in *the epithet* fawn-waisted, *where the term expressive of Similarity is dropped.*

"Even so must it be kept" or preserved (81, 3); according to the difference in the forms of pledges. In such form as such things are kept, must the pledge be kept. Or, it must be kept in the mode of custody, to which the debtor assented. "On its loss or destruction," in case of its not being preserved, interest is forfeited by the negligence of the lender. Such is the meaning *of the text*. If the pledge "be spoiled or altered," if be broken or the like, the consequence is the same; interest is forfeited as in the case of loss or destruction. In this interpretation CHANDÉSWARA concurs.

82.

VISHNU:—By the use of a pledge *to be kept only*, the interest is forfeited; and the creditor shall make good the loss of a pledge, unless it was caused by the act of GOD or the king, *and without his fault.*

"By the use of a pledge;" *already* expounded by the use of a pledge *to be kept only.**

* Gloss on v. 78.

If the loss of the pledge be caused by the act of GOD, or of the king, without any fault on the part of the creditor, his recovery of the principal and interest will be propounded. For example; when a horse or ox is pledged, and dies of disease notwithstanding the best medicaments administered, or is forcibly seized by the king, though guarded with the utmost diligence, the loss is caused by the act of GOD, or of the king. But the creditor must make good a pledge lost without such *inevitable necessity;* either by payment of its value *in money*, or by delivery of an equivalent *in kind*. But in the case of his not making good the pledge, NÁREDA ordains the forfeiture of the principal (83). Such is the gloss delivered in the *Retnácara*.

83.

NÁREDA:—If a pledge be lost, *and the creditor do not replace it*, the principal itself shall be forfeited; unless the loss was caused *without his fault*, by the act of GOD, or of the king.

This case of a pledge not made good must be understood where the pledge is not replaced by an equivalent, and is equal in value to the amount of the principal *debt* together with interest. It is also proper to apply *the same rule* when the creditor, in consequence of his actual poverty, is unable to pay the excess of value, or when the value of the thing cannot be ascertained.

The forfeiture of the principal, implies the forfeiture of interest as well as principal. It would be inconsistent with reason that the principal should be forfeited, and the interest remain due.

84.

YÁJNYAWALCYA:—If a pledge for custody only be used, there shall be no interest; nor, if a pledge for use be damaged: a pledge spoiled, *lost*, or destroyed, unless by the act of GOD or of the king, shall be made good *by the creditor*.*

"Spoiled *or lost*;" broken, stolen or the like, and become utterly unfit for use. "Destroyed;" annihilated, or totally lost. Both these pledges must be made good by payment of the value, or otherwise. The *Retnácara*.

Consequently the term "destroyed" signifies dead, burnt, or the like. It may be questioned how "stolen" can be suggested by the word lost *or spoiled*? If a thing stolen be recovered, it is not lost; if it be not recovered, it is *totally lost, or similar to a thing* destroyed; but the *intermediate* possibility of recovery does not justify the consequence.

The text of NÁREDA (81, 3), as expounded by CHANDÉSWARA, "on the loss or destruction of the pledge interest is forfeited," is inconsistent with these texts. It should not be affirmed, that, under the authority of both texts, the forfeiture of interest, and satisfaction for the pledge, are both ordained. This would be inconsistent with the text of VYÁSA.

* The last hemistich only is cited in this place; the verse at large is cited after v. 91. I place it here, because reference is made to it before the latter citation.

85.

VYÁSA :—If gold, or other *precious* thing, shall be pledged, and lost by the negligence of the receiver, that creditor, on the principal and the interest of his loan being paid, shall be forced to pay the price of the pledge.

Here "receiver" *intends* the receiver of the pledge, or creditor; for the pledge, being in the creditor's possession, cannot be lost by the *immediate* fault of him who received the loan. It may indeed sometimes happen immediately : for example, the borrower, applying to the lender, with the intent of inducing his acceptance of the terms,—conceals the proper food of the cow offered as a pledge, and describes it otherwise; the creditor, confiding in his information, lends the money on such a pledge: afterwards mischief arises from change of food. In this and other cases *the reader* may draw his own inferences. But, in the case supposed, it would be inconsistent with reason that the creditor should be liable to make good the value of that pledge.

In such cases, we hold, that the matter must be settled by learned men, discriminating the faults on both sides. Since no rule is expressly declared by Sages, nor anything particularly stated by ancient Authors, *the case must be determined* by honest men of acute sense. If any rule on this subject be declared in books of other countries, they *who assert a settled rule* have the advantage *in the debate.* Thus, when a pledge is lost, if the creditor do not announce the loss, he forfeits interest, and must make good the pledge under the authority of the texts of NÁREDA and VISHNU (81, 3 and 82). In this case, his concealing the loss of the pledge is a fault on the part of the creditor, wherefore interest is forfeited : and this is reasonable; for the creditor concealed the loss, from a desire of receiving interest, reflecting, "if the loss of the pledge were announced, the debtor, borrowing money elsewhere, would pay the debt and demand his pledge; by which my interest would be forfeited :" concealment therefore was a great offence. But interest only stops after the loss of the pledge; the interest due before that loss may be received.

The text of VYÁSA must be applied to the case where the loss of the pledge was announced. Consequently, the pledge being lost, by the fault of the debtor or of the creditor, and the loss not being announced by the creditor, interest is forfeited. But if it be lost by the creditor's fault, and the loss be announced, he must pay the value of the pledge, or give an equivalent, and may receive the principal and interest. In the same case, if he concealed the loss, he receives the principal without interest.

Some are of opinion, that the text of NÁREDA, "on the loss or destruction of the pledge interest is forfeited" (81, 3), concerns a pledge to be used. For example; when the borrower, receiving the loan, gave as a pledge a boat or the like for use; then, should the pledge be lost, the creditor forfeits interest, and the debtor loses his property : and this is reasonable; for the loss is imputable to both parties; to the debtor, because he assented to the use *of the pledge;* to the creditor, because he did use it. Hence the creditor forfeits interest, and the debtor loses the thing pledged.

Here it should be noticed, that, if the pledge be spoiled (that is, broken or the like) in consequence of use, then only should this rule be applied : for, if a pledge be used, which should only have been kept, the whole

interest is forfeited; if it be spoiled, the principal is forfeited: if a pledge, liable to be used, be actually used, half the interest is forfeited; if it be spoiled, the whole interest is forfeited. This is accurate. However, this rule concerns only a pledge for use with *the* assent *of the pledger*. If the pledger have not assented to its use, the same rule should be understood, which is directed in the case of a pledge for custody only.

"The use of a pledge," in the text of VISHNU (82), being expounded by CHANDÉSWARA, the use of a pledge to be kept only, it is proper to infer the loss of a pledge for custody only, in the phrase, "the creditor shall make good the loss of a pledge." VYÁSA, specifying "gold or other precious thing," evidently intends a pledge for custody only. YÁJNYAWALCYA (84), ordaining the forfeiture of interest if a pledge for use be broken or the like, adds, "a pledge spoiled must be made good;" that is, if a pledge for custody only be broken or the like, an equivalent must be given. There is no impediment to this induction. Consequently the text of NÁREDA, "if a pledge be lost, the principal itself is forfeited" (83), coinciding with the texts of other Sages, may be well expounded, "if a pledge for custody only be lost." Or if "lost or destroyed" be explained absolutely lost, or totally destroyed by mortality, fire or the like, this may be understood of a pledge to be used: accordingly YÁJNYAWALCYA, having ordained, with a view to pledges for custody, that a pledge spoiled shall be made good, directs a pledge destroyed to be made good as a rule concerning pledges for use. But this also concerns pledges for custody; and thus the *true* sense of the expression, "a pledge spoiled shall be made good," is obtained. This they hold reasonable.

Others say, if a pledge for use be spoiled or rendered unfit for its purposes, interest is forfeited: the authorities are the texts above cited "on the loss of a pledge interest is forfeited" (81, 3), and "there shall be no interest if a pledge for use be damaged" (84). If the pledge be absolutely lost, being burnt or destroyed, an equivalent must be given, or the principal is forfeited: the authorities are *other* texts; "the creditor shall make good the loss of the pledge" (82); "if a pledge be lost, the principal itself is forfeited" (83); "a pledge destroyed shall be made good" (84). If a pledge for custody be spoiled or damaged by the negligence of the pledgee, even without the use of it, or if it be damaged by use, interest is forfeited under the text (81, 3), "and even if it be only spoiled or altered." If it be *utterly* lost and destroyed, the principal itself is forfeited, or an equivalent must be given, under the text (86) "any pledge being wholly spoiled, the principal debt shall be lost," and (84) "a pledge spoiled or lost must be made good."

Here it must be understood, that, when the pledge is lost by the fault of both parties, one forfeits interest, the other loses the thing pledged. When it is lost by the fault of the creditor alone, it must be argued, that the creditor shall make good the pledge or give other satisfaction according to circumstances. The loss cannot *easily* happen by the fault of the debtor alone: however, should it any-how happen *by his fault*, the loss of the thing pledged falls solely on the debtor, as in the case of a loss caused by the act of GOD or of the king.

86.

VRĬHASPATI:—Any pledge being used, and wholly spoiled *by the fault of the pledgee*, the principal debt shall be lost, if the pledge be of great value in respect of the debt, and he must fully satisfy the pledger.

"Wholly spoiled;" rendered totally unfit for use. "If the pledge be of great value," in respect of the sum due *to the creditor*. The *Retnácara.*

According to the last-mentioned opinion, this concerns only a pledge for custody. But, according to the former opinion, there is no difficulty in referring it to both *sorts of pledges.* "In respect of the sum due to the creditor;" that is, in respect of the aggregate of principal and interest; for it would be improper to forfeit the principal while the interest remained *due.*

"He must fully satisfy the pledger," by humble supplication and the like. If he be not so satisfied, the pledgee must pay a sum not exceeding the value of the pledge. Under this law, if clothes, ornaments or the like, received in pawn, be wholly spoiled by the wear of them or otherwise, should their value be equalled by the amount of principal and interest, then the principal and interest shall be forfeited; if their value be not equalled by the principal and interest, the value must be made good. When clothes worth ten *suvernas* have been pledged for a debt of four *suvernas*, in consequence of the lender's obduracy, through the ignorance of the borrower or his want of any other effects, in such a case it is understood that the value cannot be made good out of the principal and interest.

MISRA expounds the text of VRĬHASPATI (86) as intending a debt free of interest.

87.

MENU:—A pledge must not be used by force, *that is, against consent:* the pawnee so using it must give up his whole interest, or must satisfy the pawner *if it be spoiled or worn out,* by paying him the original price of it; otherwise, he commits a theft of the pawn.

The text concerns pledges for custody only: a pledge to be kept only, such as clothes, ornaments or the like, must not be used. The pawnee, so using it, must give up his whole interest, or must satisfy the pawner; that is, if the pledge be worn out by use, he must satisfy the owner, by paying the value which the pledgee bore when it was well conditioned; otherwise, he would be guilty of stealing the pawn. CULLŬCABHATTA.

The text of VRĬHASPATI also (86) has the same import; for that and the text of VISHNU (82) are expounded, "if the value of the pledge cannot be made good out of the principal debt, the pledgee must pay the excess, or give an equivalent."

88.

MENU:—The fool, who secretly uses a pledge without, *though not against,* the assent of the owner, shall give up half of his interest as a compensation for such use.

The fool, who, in breach of his agreement with the owner, uses by stealth effects which should only be kept, and which were not delivered for interest *by enjoyment,* must relinquish half his interest to requite the use of *the pawn.* But, if he use the pledge by force, he must relinquish the whole interest (87). CULLŬCABHATTA.

It is therefore held by CULLÚCABHATTA, that, if a pledge for custody only be used by stealth, half the interest should be relinquished; but if used by force, the whole interest should be relinquished. A similar gloss is delivered by CHANDÉSWARA, *but* he does not specify *whether the text singly intend* the use of a pledge for custody or of a pledge for use, or *intend the use* of each. He adds to the gloss on the last hemistich of the last verse, "but if the pledgee do not give up the interest, he must satisfy the debtor by *paying* the computed value of such use." Thus arbitrators tell the creditor who has used a pledge without authority, "thou must give up interest." In that case, if the creditor refuse to give up interest, the value of usufruct should be assessed and deducted from the amount of principal and interest. The same form should also be observed in the case where half the interest ought to be given up.

But VÁCHESPATI MISRA says, in every case where the pledge is used against the will of the owner, the whole interest is forfeited; when a slave or the like, being pledged, is reasonably employed, half the interest; but if a pledge for custody be used, the whole interest shall be forfeited.

89.

CÁTYÁYANA:—He who employs on work an unwilling *slave or other living* pledge without the assent *of the owner*, shall be compelled to pay the value of the work, or shall receive no interest on his loan.

According to all opinions, this text does not solely concern a pledge for custody; for it states employment on work, and the unwillingness *of the living pledge; but* a pledge for custody cannot be willing, nor can it perform work. The text concerns both a pledge for custody, and a pledge for use. The sense of the text is, "he who employs in labour, without the assent of the owner, a pledged slave or the like, who is unwilling to work, shall be compelled to pay the value of his labour, or shall receive no interest."

The *Retnácara.*

According to MISRA the interpretation is the same. "The value of the work;" whatever is the just hire for the work performed by the slave, or whatever has been gained through his labour. It may also be understood of the hire of boats or the like: but in this case employment on work is figurative. Although "unwilling" be a superfluous term in respect of boats and the like, since it is only significant in respect of slaves and the rest, there is no objection *to a comprehensive interpretation.*

If a debtor, through anxiety for *the celebration of* a festival, or through generosity, assent to the use of the pledge, and *also* stipulate other interest, in that case there is no forfeiture of interest: to make this evident it is said, "without the assent of the owner." If a slave, *whose employment is* not authorized, be unwilling to work, *and be nevertheless employed*, interest is forfeited; therefore the Sage adds, "unwilling." Consequently, if a slave be employed without his own consent, and without permission from his master, the pledgee must give up his whole interest; with the slave's consent, but without his master's permission, half the interest (for this coincides with the text of MENU (88); with the master's permission, but against the slave's will, also half the interest: else, "unwilling," in this text, would be insignificant.

This text may, *however*, be restricted to pledges for custody only. Thus the verb "do" signifies act or transact, as it is explained by those who are conversant *with law;* "work," employment *or use of* a copper caldron or the like to hold or boil rice. He who so uses such a vessel, is meant *by the text.* "Without the assent *of the owner*," as before explained. "Unwilling;" concerning which *pledge* it is not the will or intention *of the owner* that the creditor should benefit by the use of that caldron. Such will *or intention* is presumed, when the owner, seeing or hearing of the use of the pledge, manifests no displeasure. It should not be objected, that *the phrase*, "without the assent *of the owner*," becomes unmeaning. Although it were against his wish, he may consent through favour or the like.

When a slave, a cow, or the like, has been pledged, and interest has been separately stipulated, food must be supplied by the pledger alone. In such a case, if the creditor through tenderness supply their food, he shall receive interest, even though he employ them on work. If the debtor furnish food, but the slave perform with good humour some trifling work for the creditor, there is no forfeiture of interest. When such a contract is made, it must be attributed to the anxiety of the debtor for *the celebration of* some festival, *wherefore he submits to such terms.*

From the expression "without assent," in the text of CÁTYÁYANA, *it is inferred, that,* should a slave be employed even with his own consent, but without the sanction of his master, half the interest is forfeited; if he be compelled by force, the whole interest is forfeited. But, should a pledge for custody be used without the assent of the owner, the whole interest is forfeited, even though no force be employed; as is suggested by the term "for custody only," in the text, "if a pledge for custody only be used, there shall be no interest" (84). This interpretation, consistent with the gloss of MISRA, is best. However, should the owner consent to the use of a pledge, which *regularly* ought to be kept only, and stipulate other interest, there is no forfeiture.

If the pledgee maltreat a slave unwilling to work, he shall be fined.

90.

CÁTYÁYANA:—But he who with words, or with blows struck on a sensible part, insults or pains a pledged *slave or the like* refusing to work, shall *forfeit the interest of his loan,* and pay the first amercement.

This text, from the title, *under which it is introduced,* shows that he who so abuses his pledge, shall receive no interest. The first amercement is here mentioned incidentally. The *Retnácara.*

Since this text is inserted under the head of Forfeited Interest, the loss of interest is implied. The amount of the first amercement and other fines has been variously stated by MENU, NÁREDA and others; and it should be regulated, in the title of Fines, according to the degree of the offence. The sense of the text is this: "he who hurts a slave, or other *living* pledge, with blows of a staff or stick struck on a noble part, or who menaces him, shall pay as a fine the first amercement, and of course shall receive no interest." The word "staff" is used generally, intending any *instrument for inflicting* corporal pain.

Does this text concern a slave or other similar pledge employed without the assent *of the owner*, or universally any slave or other living pledge? If it be said, the first alone is suitable; for, when the employment of a slave or the like has been authorized by the owner, he may be tasked by the creditor as *if he were* his own slave; should he refuse to work, proper chastisement may be inflicted; and this is consistent with reason; the text is therefore properly referred to the unauthorized use "*of a pledged slave*:" that is denied; for he should only be bidden to work, although his employment have been authorized. The slave of another, who has amicably authorized his employment, should not be beaten: even though the usufruct were assigned in lieu of interest, the pledgee should only tell the owner, "your slave does not perform my work, you must assign other interest:" on this information the owner must do what is proper; if the creditor act otherwise, he incurs a fine. The last supposition is alone right. Accordingly it is said in the *Retnácara*, "this text, from the title under which it is introduced, shows that no interest shall be received." On any other construction, the forfeiture of interest is *already* suggested by *another text* (89), and it would be therefore improper to establish an implied sense of this text.

MENU ordains that no interest shall be received even in the case of using a pledge which *regularly* may be used.

91.*

MENU:—If he take a beneficial pledge, *or a pledge to be used for his profit*, he must have no *other* interest on the loan.

If land, a cow, a slave, or the like, be delivered as a pledge to be used, the creditor shall not receive the interest already ordained on loans of money. CULLÚCABHATTA.

By this phrase, "land, a cow, a slave, or the like," the reference to pledges, which *regularly* may be used, is made evident. It might be proper to say, "land, cows, slaves, gold or the like; for all concur in the forfeiture of interest, if a pledge be used, which ought only to have been kept. By the expression, "delivered as a pledge to be used," a loan bearing *that* interest, which consists in the usufruct *of the pledge*, is intimated. To remove the inconsistency of denying interest, the Sage adds "on the loan;" meaning no such interest as previously ordained by MENU in the form of *pecuniary* interest on loans at the rate of an eightieth part and so forth. CALLÚCABHATTA expresses the same in his gloss, "already ordained." Consequently, if the use of the pledge have been settled by way of interest, no other interest shall be received.

But CHANDÉSWARA expounds "beneficial" *actually* used. Having explained this text as denying interest generally, he cites, as a special rule, the text (88), which ordains the relinquishment of half the interest, "if a pledge be used without, but not against, the assent of the owner," prefacing *the text with the word* "so." Again premising "so," he cites the text of MENU (87), and expounds it as ordaining, that, if a pledge be used by force, though its use be forbidden, the whole interest must be given up. Consequently there is no difficulty in referring these three texts to pledges for custody only. In this case the text *last quoted* (91) concerns a pledge of which the use has been stipulated, and so forth, *being intended* to prohibit interest according to circumstances. It should not be objected, since

* Sec. V, 117.

the use and profit of the pledge is *received as* interest, how is interest to be relinquished? If the pledge be used, half the interest, (that is, half of the legal or of the stipulated interest) must be given up, because *the use of the pledge was* not settled in lieu of interest. YÁJNYAWALCYA (84) ordains the forfeiture of the whole interest, in every case where a pledge for custody only is used.

If a pledge to be kept only, as clothes, ornaments, or the like, be used, there shall be no interest; *nor* if a beneficial pledge, as an ox or the like, be rendered unfit for use. The *Dípacalicá.*

That is, if it be rendered unfit for use, there shall be no interest. A similar gloss is delivered in the *Retnácara.* But if a pledge, which *regularly* may be used, be *actually* used, since the relinquishment of half the interest is ordained, the *universal* prohibition of interest is unfit. As for a pledge to be kept only, if that pledge be used, the forfeiture of interest must be regulated in due proportion. For instance, both the value of the usufruct and the amount of interest should be ascertained and compared; as has been mentioned under the head of Prohibited Interest.

By the use of a pledge, however inconsiderable *the value of its usufruct may be,* the interest is forfeited, however great *its amount;* because the pledgee has violated the terms of the agreement.

The author of the *Mitácshará.*

"Terms of the agreement:" the bargain: a pledge delivered for use being a pledge to be used, and a pledge delivered for custody only being a pledge to be kept.

But MISRA says, forfeiture of interest, *if* a pledge for custody only be used, is one rule; forfeiture of interest on the *unauthorized* use of a pledge which *regularly* might be used, is another rule; and forfeiture of interest if the pledge be damaged, is again another rule. The meaning has been already explained. The meaning of the second rule is, that half the interest is forfeited by the unauthorized use of a pledge, which *regularly* might be used; and the whole interest by the use of such a pledge, if the profit were assigned in lieu of interest, or if it be used against the consent of the owner.

92.

VRĬHASPATI:—If the creditor, through avarice, use a pledge before interest cease on the loan, or before the stipulated period expire, the debt shall bear no further interest.

2. Like a deposit, the pledge must be carefully kept; interest is forfeited if it be damaged.

If it be agreed that a pledge shall be used at a specified time, it must not be used while the period is incomplete. This is declared *by the text.*

The *Retnácara.*

For example; a borrower receives a loan on the security of a pledge, and makes an agreement in this form: "this pledge shall remain in your possession, if I do not discharge the debt at the expiration of five years, the pledge shall be enjoyed by you:" and the borrower pays interest independent thereof. In this case the use of the pledge before the stipulated period is unauthorized; it should not be taken. But when the period has expired,

then only shall the pledge be used; and interest is not thereby forfeited. If the debt were contracted with an agreement, "I will redeem the pledge when the principal is doubled;" then if the pledge be not redeemed although the debt be doubled, the pledge may be used after notice given to the debtor's kinsman. In that case also there is no further interest (119).

This use of a pledge is legal: but how can amicable enjoyment *of a pledge* which *it* is in the debtor's power *to forbid*, be justified by law? If a creditor use a pledge without the assent of the owner, before the stipulated period expire, and before interest cease on the debt, he forfeits the interest previously agreed on, and which had not been paid. But if the interest have been paid, a deduction must be made from the principal. This is deduced from the text of CÁTYÁYANA (89), and from common sense. If the owner, when the debt is contracted, amicably consent to the use of the pledge, interest is not forfeited: this is reasonable.

Does the text of VRĬHASPATI (92) concern a pledge to be used, or a pledge to be kept only, or both? On the first supposition it would be wrong to say, that a pledge for custody may not be used when interest has ceased *on becoming equal to the principal*, and when the stipulated period has expired; for the use of a pledge given for custody is authorized after the debt is doubled (121, 2). On the second supposition, what is the rule in respect of a pledge for use? If it may be used from the date of hypothecation, there is a contradiction to reason in *allowing both* the use of a pledge and the receipt of interest independent thereof. If it may not be used, even when the period has expired and the debt has ceased to bear interest, it is inconsistent with reason that a pledge for custody may be used, but a pledge for use may not be used. On the third supposition, the distinction of pledges for custody and for use would be fruitless.

To this it is answered, the text concerns both; but the distinction has its use. The unauthorized use of a pledge for custody only, even though not *expressly* forbidden *by the owner*, induces a forfeiture of interest (84). If an employable pledge be used without the consent of the owner, half the interest is forfeited; but against his consent, the whole interest (87 and 88). A pledge for custody only (84) signifies a pledge not delivered for use, and unlimited as to time. Such is the opinion of VÁCHESPATI MISRA. But, according to CULLÚCABHATTA, the same must be affirmed of a pledge for custody which is affirmed of a pledge for use; else it is a disparagement to him that he has not distinguished them.

If a pledge for use or custody be spoiled or altered, the interest is forfeited (81, 3); if it be lost or destroyed, the principal itself and the interest are forfeited (83, 81, 3, 87 and 86); for the term used in the text (81, 3) is explained in the *Retnácara*, "on the loss or destruction of the pledge by the fault of the lender." It is ordained in the rule of VISHNU (82) and text of YÁJNYAWALCYA (84), that the loss of a pledge must be made good. An alternative is *thus* stated, the delivery of an equivalent in lieu of the pledge, or the forfeiture of principal and interest. A third case is stated; payment of the *pecuniary* value of the pledge (85). All this *must be explained* according to the fitness *of the thing for use*; since it is virtually the same, whether a thing be rendered wholly unfit for use, or be totally destroyed. But a pledge, though rendered unfit for use, becomes the property of the creditor; for that is reasonable. By the mere use

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of a pledge for custody only, interest is forfeited, as appears from the term "a pledge for custody" in the text of YÁJNYAWALCYA (84): but it is proper to assert, that interest is not forfeited by the authorized use of a pledge which *regularly* should only be kept. *In general*, there is no forfeiture of interest by the authorized use of a pledge which *regularly* may be used. Interest is forfeited by the employment of a slave or the like against his will, though authorized by his master (89). Whether the employment of him be authorized or unauthorized, if an unwilling slave be beaten, a fine shall be paid (90). If an employable pledge be used without the consent of the owner, half the interest is forfeited (88). If it be used against his consent, the whole interest is forfeited (87).

In the gloss of CULLÚCABHATTA it is stated, that the text concerns a pledge for custody only. His meaning has been already explained. A pledge, whether such as should be kept only or such as may be used, must not be used before the stipulated period expire, or before interest reach its limit. If it be used, interest is not valid against the price of its use. The value of the use must be discharged out of the interest due. This is consistent with reason. If a pledge, either for custody or for use, be rendered partially unfit for use, interest is forfeited in proportion to the injury and damage (92 and 84). By stating forfeiture of interest in proportion to the injury or damage, the disparity of forfeiting the whole interest for trifling damage is removed. But those who follow the opinion of the author of the *Mitácshara* must affirm, that the whole interest is forfeited under the authority of the text, however inconsiderable the damage, as well by the use of a pledge to be used, as by that of a pledge for custody. This is liable to objections. Others say, if the use of the pledge be stipulated by way of interest, there shall be no other interest (91). Otherwise, interest is allowed at the rate of an eightieth part and so forth.

If the loss be caused by the act of GOD or of the king, what should be done? On this point,

93.

VRÍHASPATI ordains:—If a pledge be destroyed by the act of GOD or of the king, the creditor shall either obtain another pledge, or receive the sum *lent*, together with interest.

"Be destroyed;" become altogether unfit for use. The *Retnácara*.

If the debtor cannot immediately discharge the debt, he must deliver another pledge. If he cannot deliver another pledge, he must immediately discharge the debt: for without supplying the word 'immediately,' the alternative of delivering another pledge or paying the debt would be ineffectual. But if he be utterly unable to do either, the debt is from that period unsecured by pledge *or surety;* and the creditor shall receive the proper interest on such debts.

94.

VYÁSA:—If the pledge be destroyed by the act of GOD or of the king, no fault is by any means imputable to the creditor; and *immediately* after the loss of that pledge, the debtor shall always be compelled to pay the debt *with interest,* or deliver another pledge.

"Shall be compelled to pay the debt;" 'with interest' and 'immediately' must be supplied. The particle has the sense of "or," since the text has the same import with that of VRĬHASPATI (93).

"Shall be compelled to pay the debt;" shall be required to pay the *debt;* for most correct speakers admit the causal passive for certain verbs only, such as go, use, know, and the like; and the verb give or pay could not otherwise be employed in the causal passive: it could not be said, the debtor shall be compelled to deliver another pledge. The same must be understood also in subsequent phrases *of this sort* used by authors.

95.

NÁREDA:—When a pledge, though *carefully* preserved, is spoiled in *course of* time, another pledge must be delivered, or the amount *of principal and interest* must be paid to the creditor.

"Spoiled;" totally unfit for use. "The amount;" the sum borrowed, with interest: for the purport is the same with the preceding texts. If a pledged cow or the like in the course of time become old, or otherwise *useless* another pledge must be delivered.

96.

YÁJNYAWALCYA:—By the acceptance *or actual possession* of a pledge, *the* validity *of the contract* is *maintained.*(45) If it be spoiled, though carefully kept, another chattel must be pledged, or the creditor must receive the amount *of principal and interest.*

"By the acceptance *alone;*" by *actual* occupancy alone. By acceptance and use of a pledge, not by mere indication. The *Dípacalicá.*

"By use;" alluding to a pledge delivered for use. This will be explained under the head of the Validity of Pledges.

"By acceptance" of a pledge for use or custody; by actual possession or enjoyment, the hypothecation is rendered complete; not by the mere attestation or execution of a written contract and the like. The *Retnácara.*

97.

CÁTYÁYANA:—When a pledge becomes unfit for use, or perishes, without any fault on the part of the creditor, the debtor shall be compelled to deliver another pledge; *for,* he is not exonerated from the debt.

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(45) It is evident from this text of YÁJNYAWALCYA that among Hindus, a mortgage or pledge unaccompanied by possession confers no title:—nevertheless, JAGANNATHA argues that a symbolical delivery of possession is sufficient to constitute title in some instances. Vide *infra,* comments on v. 126. In cases where there is other evidence of transfer, possession is not necessary—*Ibid.,* v. 134.

In the case of *Sibchunder Ghose* v. *Russick Chunder Neoghy,* decided by the Supreme Court at Calcutta, it was held (GRANT, J. *dissent*) that by long established custom, by reference to the maxim, that whilst the *lex loci contractus* governs the substance of the contract and its essential forms, the *lex fori* applies as to the forms of remedies and their consequences, a Bengálí mortgage, although unaccompanied by possession, gives a lien upon land. 1 FULTON, 36. The doctrine of an equitable mortgage is not applicable to the Hindu law (*Dictum* of PEEL, C. J. *Ibid.*)—EDITOR.

When a pledge becomes unfit for use, or perishes, provided that detriment or destruction be not caused by any fault on the part of the creditor, the debtor shall be compelled to deliver another pledge: in this csae, the debt is not cancelled by the mere loss of the pledge. The Sage makes that evident. "Because" should be supplied. Because the debtor is not in such a case exonerated from the debt, therefore, another pledge must be delivered, or payment be made. A similar gloss is delivered in the *Retnácara.*

As for what some affirm, that if a pledged cow or the like die by accident, the creditor's money and the pledger's property are lost, that is only founded on approved usage, not inconsistent with divine law. The *Retnácara.*

A similar remark is made in the *Chintámeni*, and by BHAVADÉVA and others. The meaning is, that the creditor's loss, when a pledge is destroyed without any fault on his part, is not confirmed by any Sage. But local usage on this point should not be abolished.

98.

The *Vámena purána*, cited by the modern VÁCHESPATI and by RAGHUNANDANA:—A man should not neglect the approved customs of districts, the equitable rules of his family, or the *particular* laws of his race.

99.

In whatever country, whatever usage has passed through successive generations, let not a man there disregard it; such *usage* is law in that country.

Here it should be remarked, that if some *Bráhmana* have borrowed money on a mortgage of his land situated near a river, and that land be afterwards washed away by the river, it is not seen in practice, that the creditor's money is lost. Accordingly it is said in the *Retnácara*, "a pledged cow or the like." This is founded on the following practice: A cow of small value dying, the debtor asserts, "he did not give sufficient attention to her cure;" the creditor affirms, "I gave the properest remedies." On this question a decision could not be passed without minute investigation. Arbitrators, therefore, mediate and determine that the loss shall be borne by both parties. This practice appears to be the ground of the usage.

From the expression "perishes" or dies, it is evident that when a pledged cow or the like dies, and from the expression "becomes unfit for use," that when it becomes totally unserviceable, the debtor shall be compelled to deliver another pledge. Although a copper caldron or the like, and land or other *immoveable property*, cannot die, yet, as its total destruction is similar to *the* death *of an animal*, the same rule should be understood; for, although it be not expressly stated in the texts of VYÁSA and others, such is the import of the texts. As the principal is forfeited when the destruction of a pledge is caused by the fault of the creditor, because it is *in effect* the same with such a pledge vitiated; so, in this case also, another pledge must be given, because both are *in effect* the same. This may be inferred from reasoning.

Why is "destroyed," in the text of VRĬHASPATI (93), expounded 'rendered totally unfit for use?' The answer is, to show that another

pledge must also be given, if the pledge be rendered totally unfit for use. If it be not destroyed by the creditor's fault, from what cause does the loss happen? It must be understood that the loss happens by the act of GOD, or of the king; for the purport is the same with the text of VYÁSA (94), and with the text of VRĬHASPATI (93).

The act of the king is *meant of* pillage by an army, and the like; the act of GOD *intends* the fall of a thunderbolt, or the like: and this generally; comprehending the act of an enemy, the conflagration of a house or the like, the depredations of robbers and so forth. On this and other points the reader himself must deduce just inferences from reasoning. The *Retnácara.*

100.

YÁJNYAWALCYA:—Mortgaged land being carried away by a rapid stream, or being seized by the king, another pledge *of land* must be delivered, or the sum lent must be restored to the lender.

This text is applicable to the case of a pledge destroyed or lost by fracture, theft, combustion, or the like.

"Or being seized by the king;" *in some cases* it may be legally seized by the king, to sell it for a fine imposed on the debtor, or because the king has not *actually* given the land which he had declared *an intention of* giving to the debtor, who is a soldier, or the like. Illegally it may happen in other cases also.

"Another pledge;" of land must be understood. If he do not deliver that, the sum *borrowed* must be repaid by the debtor, with interest.

The *Retnácara.*

"Another;" that is, other than the pledge originally delivered. "A pledge of land;" this is reasonable: but if other land cannot be delivered, any other pledge may be given. However, if the former pledge were delivered for enjoyment, he must now also give a pledge adapted to that *purpose.* Or, if that cannot be, he must give a pledge for confidence only, and pay a sum equal to the value of the usufruct of the former pledge, until the debt be discharged. But if separate interest be paid, and the use of the pledge be allowed through complacency, by these words, "you may use the pledge;" in that case the value of usufruct need not be paid.

It is thus evident, that if mortgaged land be destroyed, the loss falls on the debtor alone. "Land" is an instance only, suggesting also kine, gold, and the like. "Carried away by a rapid stream" is merely illustrative of a loss happening by the act of GOD; for it has the same import with *the following text:*

101.

CÁTYÁYANA:—Whatever pledge has been lost by the act of GOD or the king, the debt, for which it was given, shall be paid by the debtor to the creditor, with interest.

The sense suggested by this text is, "whatever pledge," whether for custody only, as gold or the like, or for use, as land or the like, *has been lost* "by the act of the king," or of his officers or the like; or by the act of GOD, as carried away by a rapid stream, or destroyed by fire, &c. Accordingly it is said in the *Retnácara,* "carried away by a rapid stream is illustrative of a

loss happening by the act of GOD." This text (100) is not quoted in the *Mitácshará* and *Dípacalicá.*

Creditor and lender signifying the same, the loss of the pledge falls on the debtor. This text ordains payment of the debt with interest; there is not consequently a *needless* repetition of the former text (97). However, "lost" is merely an instance of spoiled, and so forth; for the text coincides with that of NÁREDA.

SECT. II.—*On the Redemption of Pledges.*

When the debtor, tendering the sum due, claims the release of the pledge, what should be done by the creditor? A small part only being tendered, should it be accepted? or should the whole amount of the debt *be alone accepted?* As to the first supposition,

102.

VRÍHASPATI ordains:—The whole amount due to the pledgee not being paid, he shall on no account be compelled to restore the pledge against his will, *nor shall it be obtained from him* by deceit or confinement.

"The pledgee;" in the sixth case, but with a dative sense; to him who has received the pledge, namely, to the creditor. If the whole amount of principal and interest be not paid to the creditor, he shall not be compelled by the king to restore the pledge against his will. A pledge must therefore be released by the creditor, on receipt of the entire sum *due*, not on receipt of a part only. If the greater part of the whole debt have been discharged, shall the pledge be retained on account of the smaller part, or not? In answer to this question, the present text is propounded. The Sage adds, he shall not be forced to restore it by *legal* deceit, or any other of the modes of recovery.

"By deceit or confinement;" the first term is explained by some, deceit or fraud. "Confinement;" sitting constantly at his gate, or the like, as will be explained. The word "or" is indefinite, also suggesting a law-suit and the like. It should not be objected, that, from the terms of the definition of *lawful* confinement (239), its acceptation is restricted to payment obtained from a debtor. Such a definition, being merely explanatory, is not restrictive.

Again, when a debtor, having delivered a pledge of great value to the creditor, and repenting thereof, wishes to exchange it for one of less value, then also the exchange must depend on the consent of the creditor. This must be understood from parity of reasoning, as is observed in the *Retnácara;* 'when the whole sum due and secured by the pledge is paid to the creditor, who holds that pledge, then only must the pledge be released, however great its value may be.' *The debtor* saying, "receive some other pledge, and restore the costly pledge; with the delivery of the other pledge, I will give thee a written contract, or cause the delivery to be attested:" in this case also, the king shall not force the restoration of the pledge by the modes of deceit, confinement, or the like. Nor shall the pledge be released on payment of a small part *of the debt* only. "Receive some other pledge, &c." is a *supposed* speech of the debtor. In this case also, the creditor shall not be compelled to restore the pledge against his will.

A debt has been contracted on the mortgage of a piece of land, measuring a *crósa* in circumference; a part of the debt has been afterwards paid, *but* the land is accidentally carried away by a rapid stream: this *text* may be *expounded as* restraining a creditor, who in that case demands a mortgage of land, measuring a *crósa* in circumference. But the reading is (*chitréna rachiténa*) by painting *or dyeing*, and by manufacture, instead of (*chitréná-chariténa*) by deceit and confinement. Thus, when a pledge of land or the like must be delivered to a creditor, who had already received a pledge, the debtor shall not be compelled to deliver a pledge for the whole value, similar to the former pledge of valuable land or the like. In what case? To this the Sage replies, if the debt be not fully paid; that is, if the whole be not paid, but a part be paid: if a part be paid "by painting or dyeing, or by manufacture." "By dyeing;" by the practice of the art of dyeing silk. "By manufacture;" by the practice of art in the construction of a house or the like. "Or" is indefinite; and direct payment by the practice of any other art is thereby comprehended in the text. This is a very modern interpretation.

Or the word "its" may be supplied. Thus, a pledge being lost by the act of GOD, another pledge should be given to the creditor who received the former pledge; but, if its amount or value have been made good by the debtor himself in the practice of some art, as dyeing or the like above-mentioned, the debtor shall not be compelled by the king, against his will, to deliver a pledge for the whole value, that is, a fresh pledge of great value. It is not affirmed, that such delivery is requisite. Consequently, the original pledge being lost, and the debtor being unable to give another pledge of the same nature, or otherwise make good its value, a pledge of great price has, in the meantime, been delivered; the intermediate valuable pledge must be restored by the creditor to the debtor, who claims redemption of that pledge, having afterwards made good the value of the original pledge, by the practice of his art.

This is general. The debtor immediately pays some part of the value of the former pledge, and will deliver another pledge at a future time; to give confidence therein, he delivers a writing or attestation: in that case also the rule is the same. This other exposition follows the gloss of CHANDÉSWARA. But on this construction, "by painting *or dyeing*, or by manufacture, the amount being *partly, though* not fully paid, *he shall not be compelled to deliver a pledge for* the whole *value*" (*swadatté'c'hilam*,* instead of *adatté'rt'hé'c'hilé*) is exhibited as the proper reading in some books. To expatiate would be vain.

On the other reading (*chitrénáchariténa*) the sense may be the same; for the crude verb "*char*" bears the sense of "act," *exhibited* in *its derivative* "*áchára*" usage or practice, and in other instances. In either case, arising on these two interpretations, it must be affirmed, that, if the debtor tender payment of a part only *of the debt*, the creditor need not release the pledge; for no law ordains that it shall be then released. According to CHANDÉSWARA, another text of VRĬHASPATI (103) ordains, that a pledge shall only be released when the whole amount *of the debt* has been paid. This will be stated hereafter.

Simple men attribute an active sense of the word "pledgee" in the sixth case. Thus the construction is, "the amount, which should be paid by the pledgee or creditor, not being delivered, the debtor shall not be compelled

* I translate it "not well or fully paid," instead of, "paid by *the man* himself." The term is expounded both ways in preceding paragraphs; but why should a new pledge of less value be given, if the debt have in the meantime been paid? T.

by the king, in any of the modes of recovery, by deceit, confinement, and the rest, to deliver the pledge to the creditor." Consequently, if the debtor, having executed a contract of hypothecation, has not received the whole loan, although he have demanded it, and has therefore obstructed the enjoyment of the pledge, this text establishes the rule of decision on such a case. It will be mentioned, that hypothecation is not vaild on a writing alone without enjoyment. These interpretations are either founded on the text, or on the reason of the law. They should all be admitted.

As to the second question, (*the whole debt being tendered, must it be accepted?*) if the debtor have contracted the debt on an agreement, that the pledge, consisting of land or the like, shall be enjoyed so long as the principal sum remain undischarged, but that no interest shall be paid, independent *of the pledge;* in that case, the principal alone *being tendered,* it must be accepted. The same Sage ordains it.

103.

VRĬHASPATI :—When the debtor, tendering the principal sum, demands the pledge, even then it must be released; otherwise the creditor is criminal.

This concerns a pledge to be used for an indefinite period.

The *Retnácara.*

"Otherwise;" that is, if he procrastinate, coveting the enjoyment of the pledge; or if he covet *and demand* other interest. The following text declares an offence as well in regard to pledges for custody as others:

104.

YÁJNYAWALCYA :—To the debtor who comes to redeem his pledge, the creditor shall restore it, or be punished as a thief; and if the creditor be *dead or* absent, the debtor may pay the debt to his kinsmen, and shall take back his pledge.

"Who comes to redeem his pledge;" who approaches the creditor, bringing what is due to the creditor, *namely* the principal sum with or without interest. To him the pledge shall be restored by the creditor, after receiving the money from the debtor. Otherwise, if he do not restore it, he is guilty of stealing *the pledge; that is, he shall be punished.* CHANDÉSWARA.

If the creditor be dead, or have gone to another country, what must be done? The Sage replies, "if the creditor be *dead or* absent, the debtor may pay the money to his kinsmen;" to his sons and the rest; to his heir, or to any person charged with the support of his family: "and he shall take back the pledge" from the sons and the rest.

"To his kinsmen;" literally, to his family; that is, to his sons and the rest. The *Retnácara.*

"To his family;" to his servant or agent.—The *Mitácshará.*

Should the son or other *competent* person refuse to restore the pledge, then, by the same reasoning as before, he is guilty of theft. If any dispute arise concerning the receipt of his property by either party, that must be determined, and the delivery and receipt made *good.* If a false plea be set up, through avarice, by the creditor, he shall be punished as a thief. If the son *of the pledgee* say, "I have not power to accept payment of the debt

without my father's consent," what must be done in such a case will be mentioned *in its place.* The debtor being *dead or* absent, if his son or other heir come to the creditor, or to his son, for the purpose of paying the principal sum with interest, then also, as before, must the pledge be restored. Such is the unexceptionable method of CHANDÉSWARA.

To the debtor, who comes to redeem his pledge, it must be restored by the creditor on receiving the principal and interest. The *Dípacalicá.*

But HELÁYUDHA expounds the first half of the text of YÁJNYAWALCYA (104) and the text of VRĬHASPATI (103), 'having mortgaged a village or the like, on the next day he comes to pay the debt; but the creditor, coveting interest, neither accepts payment of the debt, nor relinquishes the mortgage; in that case, he shall be punished as a thief.' Ultimately there is no difference. It is only necessary that a pledge be restored by the creditor, on receiving from the debtor the amount then due, *namely* the principal sum with or without interest. Or, if the creditor be not at hand, the debt must be paid to his son or other representative; and from him must the pledge be received, as above mentioned. HELÁYUDHA, grounding his gloss on that of CHANDÉSWARA, has in no respect contradicted it.

When land is mortgaged on these terms, "this land shall be enjoyed by thee to the end of such a period," the land shall be enjoyed to the end of that period; the debtor cannot compulsively redeem the pledge on the second day after the debt was contracted: for there is no such special law, and the texts of VRĬHASPATI and others ordain penalties for other cases. This appears from the condition, that no definite period have been fixed, as stated in the gloss of CHANDÉSWARA, "this concerns a pledge to be used for an indefinite period." By HELÁYUDHA's expression, "on the second day," it is intimated, that a debtor may redeem a pledge by the payment of the principal only on the second day; on the subsequent day, or later, he must pay the debt with interest: but, if the stipulated period be unexpired, he cannot redeem the pledge; for that is suggested by the phrase, "on the second day," and by the condition, as specified by CHANDÉSWARA, that it be unlimited as to time; and that is not contradicted in the work of HELÁYUDHA.

"The second day" is mentioned, because a pledge may be redeemed on the second day by a debtor tendering the principal only without interest; must not a pledge be also released when a debtor tenders the principal with interest before the fixed period have expired? No; as it is directed that stipulated interest exceeding the rates prescribed by law shall be paid when it has been *expressly* stipulated, so the enjoyment of a pledge is reasonable for so long a period as has been *expressly* stipulated. On this reflection CHANDÉSWARA has said, "a pledge to be used for no definite period;" and this must be acknowledged even by HELÁYUDHA; for the following text is expounded, "what has not been held to the close of its term."

105.

VRĬHASPATI:— When a house or field mortgaged for use has not been held to the close of its term, neither can the debtor obtain his property, nor the creditor obtain the debt.*

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* See the gloss on this text cited again at v. 118.

However, two cases have been stated by two authors, in which the debt may be discharged by payment of the principal only. Such is the difference.

If the creditor be dead or absent, YÁJNYAWALCYA has ordained, that the pledge may be redeemed by payment of the debt to his son or other representative. The same *legislator* propounds another case.

106.

YÁJNYAWALCYA:—Or appraised at the value it then bears, it may remain with the creditor, exempt from interest.

The pledged chattel, then appraised by men skilful in valuation, may be fixed in the creditor's possession, with the attestation of witnesses. Thenceforward the principal, though not paid, carries no interest; for the debt is in a manner discharged by the appraisement of the pledge. If the creditor be not at hand, the debtor may redeem the pledge from his sons or other *representatives*, and pay the debt to them, or he may fix the pledge in the creditor's hands at the value it then bears: the particle "or" intends this alternative.

An alternative is of two sorts, optional, or regulated by the law. "Optional" may be instanced in written contracts and attestation; at the option of the creditor the debt may be delivered with a writing or with an attestation. "Regulated *by the law*" may be exemplified in *debts* quadrupled or octupled; quadrupled, if the loan consisted of cloths or the like; octupled, if clarified butter and the like were lent: and here an alternative arises in respect of *legal* regulation.

CHANDÉSWARA intends only a regulated case. For example; if the creditor be dead, and his son or other heir be present, the pledge may be redeemed by paying the debt to him only. By parity of reasoning, the same *may be done*, if the creditor reside in another country, if he be confined by the king, have absconded through fear of the king or the like, be afflicted with disease, be insane or the like. Consequently, when a competent creditor is absent, and his son or other *representative* is present, if the debtor can redeem the pledge from the son or other *representative*, and the son or representative can accept payment from the debtor, he may redeem the pledge by payment of the debt to that son or representative. This is one case. But if the son or other heir reside abroad with the creditor; or if the creditor be dead, and his son or heir reside in another country, or be confined by the king, or have absconded; or if the son or heir say, "my father, who resides in another country, knows all the circumstances, I am totally uninformed;" or if the creditor or debtor dispute the matter; in *all* these cases the debtor must fix the pledge in the hands of the creditor, appraised at the value it then bears. This is the second case.

If he and his family reside in another country, how should mortgaged land or the like be fixed in the hands of the creditor? It is answered, 'through him who transmits the produce of land or the like situated in one province, to a creditor residing in another province, such a pledge is enjoyed: or, in whatever manner the pledge was previously possessed, even so it may be fixed in his hands.' But this case supposes the debtor's wish to part with the pledge by selling it, or *to redeem it* by borrowing money elsewhere.

Thus, if the creditor be not so circumstanced that he can restore the chattel, but the debtor, to sell it, or having borrowed money elsewhere, wishes to redeem the pledge, what must be done? For this YÁJNYAWALCYA provides, "or appraised, it may remain with the creditor." CHANDÉSWARA.

Since the creditor is not present and competent, the debtor's wish cannot be gratified. But, if the debtor have no desire to *redeem the pledge*, by whose desire should the pledge be redeemed? It must wait the debtor's wish: and his desire to part with the pledge is ineffectual without some mode of payment of the debt. It must therefore wait his sale of the pledge, or his borrowing money elsewhere. This, however, is merely illustrative; for the same rule is apposite, if the debtor wish to redeem the pledge, having obtained money in alms, by commerce, or the like.

Although the pledge cannot be sold to another while the debt remains undischarged, since the redemption of the pledge without payment of the debt is denied by the text of VRĬHASPATI (102), still, if he could give confidence to the purchaser by a surety or otherwise, the debtor may have received the price. To such a case this rule is applicable. The two cases, as mentioned by YÁJNYAWALCYA, and connected by the word "or" which intends the regulated alternative, must be understood only when the creditor is present and competent.

In the *Dípacalicá*, ŚÚLAPÁNI observes, if the pledge for any reason be not restored to the debtor, the pledge, appraised at its then value, may remain in the house of the pledgee, exempt from interest. The expression "for any reason" comprehends other cases also, such as that stated by CHANDÉSWARA. For example: the creditor is present and competent *to civil transactions*, but the pledge, either gold weighing a hundred *palas*, or a horse, which had been seen by many persons, is at the creditor's house in another province, and he cannot immediately go thither; or a slave or the like, delivered as a pledge, has gone to another country on business: in these cases, the pledge should be appraised by men conversant with the value of things, after learning, both from the debtor and creditor, that the gold is unmixed with other metals and so forth, or that such is the age or strength of the horse or slave and so forth; and the debtor should fix the pledge in the hands of the pledgee, declaring "the pledge ascertained at such a value by appraisers and witnesses, or certified in writing, shall remain in thy possession." So in other cases also. Ultimately there is no contradiction between those *authors*. However, the appraisement is made in such a case by desire of the creditor or debtor, or both. This exhibits a portion *of the subject*, which CHANDÉSWARA also has treated partially.

But if a period were *stipulated*, the creditor entertains no *such* wish before the period expire; or, if he do, he has no right to the use of the pledge: and interest cannot be forbidden at the will of the debtor. When the period has expired, the debtor's *option* prevails. At his choice the pledge may be redeemed, or a value affixed to it; for, if he do not then redeem it, his property is devested (112). But in a case unlimited as to time, the redemption or foreclosure of the mortgage depends solely on the will of the debtor. To expatiate would be vain.

Here the valuation of a pledge only is mentioned, not its sale. In this case, the creditor, returning from abroad, may restore the pledge on receiving so much money *as was due when the pledge was valued*. Herein the *Retnácara* concurs. The same should be understood in the *proposed* case of a slave, and also in other cases. It should be here observed, that, if the

pledged slave or other pawn, having grown old or the like, bears a less value when the creditor, returning from abroad, restores the pledge, than was the value at the time of appraisement, the loss must fall on the creditor alone; for a value was then affixed merely that the principal may bear no further interest. But if the value be enhanced by circumstances of season or the like, the profit does not accrue to the creditor; for YAJNYADATTA has no true property in the value of a chattel belonging to DÉVADATTA. But the loss falling on the creditor is the consequence of his fault in not then restoring the pledge. In this there is nothing incongruous.

If the value of land, or other mortgaged property which is permanent, be reduced from the circumstances of the times or the like, what is the rule? In that case also the loss falls on the creditor; since the debtor may say, "the value is only now reduced in consequence of a dearth or the like; when I offered to redeem the pledge, it bore a greater value." By specifying "the value it then bears," the Sage intimates generally a *possible* loss falling on the creditor; *he does* not *state* specially, that in some instances no loss fall on the creditor. But in fact all this must be understood of the natural price of commodities: if the debtor, redeeming the pledge from the creditor on his return from abroad, sell it for a low price through the exigence of his affairs, he is not entitled to recover the difference of price from the creditor; but only when the just price *is reduced* by circumstances of season. This should be held reasonable.

When mortgaged land or the like has been appraised, by whom should it be enjoyed? And is a pledged slave or the like to be employed or not after the appraisement? On these doubts it is said: the use and profit of a pledge is the interest on it; interest ceasing, it follows, that the *usufruct* ceases. If the pledge were such as might be used *without detriment* (*for instance*, a tree or the like), but if the use of it were not authorized, the use of it was previously unlawful; surely now, after the appraisement, it is *unlawful* as before. The pledge being nevertheless used in the subsequent period, half the benefit must be paid to the debtor; but used though *expressly* forbidden, the whole profit must be made good to the debtor. If he assent to it, usufruct must be admitted as authorized by him. But the expression of YÁJNYAWALCYA, "may remain with the creditor," has been expounded, may be fixed in the creditor's *possession or* enjoyment; supposing the case where the usufruct is not forbidden. Accordingly ŚÚLAPÁNI has said, 'the pledge may remain in the house of the pledgee, exempt from interest;' not, 'it may remain in the pledgee's *possession or* enjoyment.' Thus may the law be concisely stated.

YÁJNYAWALCYA (46) propounds a form of redemption of a pledge when the creditor is present. This *text* concerns the case where the thing was pledged on these terms, "when the double sum has been received from the use of the pledge, it shall be restored by thee." That is, provided interest were stipulated; else *the pledge must be restored* on payment of the principal only. This is called in the world a voidable pledge.

The *Retnácara*.

The very same import is stated in the *Dípacalicá*. It may be thus explained; a pledge delivered on this stipulation, 'I will redeem this pledge by paying the debt at the close of two years," is a pledge to be released at a specific term, namely at the term of two years. In like manner, a pledge stipulated to be restored when twice the amount of the sum for which it is lodged shall be received from the use of it, is a pledge to be

released on a specific condition: this is called "a voidable pledge." "Provided interest were stipulated;" provided it bore interest; provided interest were agreed on. "Else," if no interest were stipulated, the pledge must be released "on payment of the principal only," that is, when the single sum has been received. Or, if the agreement were in this form, "enjoy the pledge until the principal sum be paid" or in this form, "enjoy the pledge until twice the principal sum be paid" (provided that *in the last case* the debtor pay interest out of other effects); the creditor shall enjoy the pledge so long as the principal sum remain undischarged.

If the pledge be used, *the price of it* must also be paid.

The *Mitácshará.*

The value of the use must be paid to the debtor. Such being the case, if the agreement run in this form, "enjoy the pledge until three times the principal be paid," what is the rule in that case? Twice the amount of the principal is alone approved by law: hence the subsequent use of the pledge is improper. If it be alleged, it is not improper, being of the nature of stipulated interest; the answer is, even in the case of stipulated interest the law has not authorized the receipt of more than double the principal paid at once.

107.

VISHNU:—That immoveable property,(46) which has been delivered, *restorable* when the sum borrowed is made good, the creditor must restore when the sum borrowed has been made good.

There is no difficulty in referring this text to a debt exempt from interest.

108.

VRÍHASPATI:—When land or other *immoveable property* has been enjoyed, and more *than the principal debt* has accrued therefrom, then, the principal and interest having been realized, the debtor shall obtain his pledge.

When land or the like has been enjoyed, and by that enjoyment more than the amount of the principal, that is, interest, *has been received*, surely the principal *sum* has been obtained: repeating this the Sage propounds the law, "the principal and interest *having been realized*," &c. The apposition is connective. CHANDÉSWARA delivers a similar gloss. This must be understood only when it was agreed that the pledge should be restored after the principal and interest have been realized; for it coincides with the text of YÁJNYAWALCYA, above cited. The same *legislator* expressly declares it.

(46) Property, wealth or substance (*Dravya*) may be divided into two great portions:—*Stʼhávara* or *Sthiradravya*, Fixed or immoveable property, as land, trees, &c., and *Asthera, Jangama*, or *Chara dravya*, moveable property, as cattle, money, &c. It is also distinguished as *Krama gata*, descended or ancestral; *Svayamárjita* or *Krita*, self-acquired or made; *A'gantuka*, accidental; *Sádhárana*, common, held in common; *Asádhárana*, that which is not common, but belongs to the holder exclusively; *Vibhakta*, divided, partitioned among separated heirs; *Avibhakta*, undivided, property held in common.—EDITOR.

109.

YÁJNYAWALCYA:—When a debtor mortgages land to his creditor, declaring and specifying, "this shall be enjoyed by thee, even though interest cease *on becoming equal to the principal;*"

2. That pledge shall be restored to the debtor, whenever the principal and interest shall have been received. This is declared to be the legal rule concerning pledges for loans on interest.

"Specifying;" ascertaining. "Although interest have ceased;" although it have reached the limit of interest, the pledge shall be nevertheless enjoyed until the principal and interest be paid. The *Retnácara.*

If the pledge be delivered with an agreement that it may be used even after the period in which interest accumulates to its highest limit, the enjoyment of it is reasonable even after the period in which the highest interest accumulates. In answer to the question, how long may it be used? this text particularly states, so long as the principal and interest are not acquitted by the use of the pledge, the creditor may use it. The import of the text may be thus stated on a full consideration of the gloss delivered in the *Retnácara.*

It should not be affirmed, that this text concerns only the case of a special agreement, and the preceding text (108) the case where no special agreement has been made: and thus, if no period have been stipulated, the creditor must release the pledge when the debt is doubled; but, in the case of a special agreement, the pledge shall be enjoyed until the debt be discharged, and the text permits the pledge to be so long enjoyed. The following rule of VISHNU denies the redemption of the pledge without a special agreement, even though the debt be doubled:

110.

VISHNU:—Even though the utmost interest have accumulated, *the creditor need* not *restore* an immoveable pledge without a special agreement.

The meaning of the text (109) is this: when the debtor delivers a pledge declaring and specifying, "this land shall be enjoyed by thee (the creditor) even though interest cease *on becoming equal to the principal,*" (for the interest has accumulated *to its utmost limit,* when interest ceases;) that pledge *shall be restored,* when *the principal has been* received. It is consequently suggested, that a pledge may be used until the principal sum be discharged, even though interest have *regularly* ceased. Or the text (as some remark) may be expounded in a different import: when a pledge is delivered with an agreement, that it shall be enjoyed even though interest cease; in that case, when the interest has been received from the use of the pledge, it must be restored, if the principal be discharged out of other funds; but if not, the pledge may still be retained.

111.

YÁJNYAWALCYA :—But a pledge shall be enjoyed until actual payment of the debt.*

If a debt amounting to one hundred *suvernas* be nearly discharged, but five *suvernas* remain due, the sense of the text is, *that* so long *as that remain unpaid, the pledge shall be retained.* No law directs that the half or quarter of the pledge shall be restored. On the other hand, in the foregoing gloss on the text cited from VRÍHASPATI (102), it is not positively ordained that it may not be restored. But this seems a great disparity. If any particular practice subsist in certain countries, it should be deemed satisfactory. This should be held by the wise. In fact, it follows from the condition stated in the text of VRÍHASPATI above cited (102), "against his will," that the pledge may be restored if the creditor consent; and such consent is proper in this case, since the use of a pledge adapted to a large sum is improper when a small sum only remains due.

How is the principal or the interest liquidated from the use of the pledge? The form may be thus stated: when arable land has been mortgaged and a debt contracted, in the month of *Srávana*, the produce being gathered in the month of *Pausha*, and the interest due from *Srávana* to *Márgasírsha*† being liquidated from the price of that *produce*, if the amount exceed *the interest*, the principal may be liquidated; if it be deficient, payment will be *taken* from the value of the produce obtained in the following year. If it be annually deficient, the pledge may be enjoyed for a longer time than six years and eight months, even until the interest be fully discharged: afterwards, on payment of the principal, the pledge shall be delivered up. But when the *exact* amount of interest, neither more nor less, is obtained from land in the month of *Jyaish't'ha*, (the debt being contracted on the mortgage of inhabited ground, *the rent of which is payable in that month*,) a period of thirteen years and four months must be completed; in that case the debt is discharged with interest, on receipt of half or a part only of the amount of rent for the current year.

This occurs in the case of legal interest at the rate of an eightieth part *of the principal.* But the use of a pledge until the principal sum be paid from other funds, occurs in the case of interest by enjoyment. If the principal be paid in the month of *Jyaish't'ha*, the rent of the mortgaged ground must be received in due proportions by both parties.‡ As a pledgee may not receive the whole rent in the month of *Pausha*, when the owner, contracting the debt in the month of *Cártica*, mortgages land which affords *annual* rent in the month of *Pausha*, but shall receive the proportion of rent for two months; so, if payment be made after some years, in the month of *Srávana*, he shall receive the proportionate rent for seven months of the current year; that is, seven parts of the whole rent divided into twelve parts. But if he receive the whole rent inadvertently in the month of *Pausha* of the first year, then, deducting a sum sufficient to discharge the interest, the surplus should be applied to liquidate the principal. In such circumstances, the principal being annually diminished, it is fully liquidated in a short period. If the land cannot yield so much rent in a subsequent year,

* See v. 229. † *A'grahàyana.*

‡ Because the full amount of interest was realized in the eighth month of the seventh year.

the debtor must make good the sum from his own funds, in conformity with the agreement. If it produce a surplus, that must be applied to the liquidation of the principal; and interest shall not subsequently be paid on that *part of the principal.*

Yet if the agreement bore that the pledge shall be enjoyed until the principal be paid, the same rule prevails in the case of a mortgage of inhabited ground; for, since rent should be daily receivable for the occupancy *of the ground,* it is proper that the creditor should receive the rent accruing from the date of the loan. If land or the like be mortgaged, which yields rent on account of the produce, receivable by custom on a day certain, and if the payment be settled for the month of *Pausha,* then, although the whole rent for that year would *otherwise* have been received, yet, if the debt be paid in the subsequent month of *Márgaśírsha,* it appears from the reason of the law, that the creditor shall not receive the rent of that year; since a day has been set for the payment of rent on account of produce, and the land was possessed by the creditor on that day in the year when the loan was made, but had been redeemed before that day in the year when the debt is paid. Still, however, as an inconsistency would occur in practice, because no interest would be received when a debt, contracted on the security of such a mortgage in the month of *Mágha,* was discharged in the earlier month of *Márgaśírsha, in a subsequent year,* the matter must be otherwise regulated, by a distribution *of the rent* as before, or by *yielding* the rent of the subsequent year.

If a milch cow or the like be pledged for use and profit, the interest should be liquidated, in conformity with the agreement, from the computed daily profit; and, if possible, the principal should be liquidated. This induction has the authority of law. With the consent of the debtor and creditor, an adjustment is formed on a middle valuation settled by arbitrators. Such is the current practice.

"The double sum," in the text of YÁJNYAWALCYA (46), supposes *a loan of* gold or the like; but if clothes or the like were lent, a treble sum and so forth must be understood, as stated in the section on Limits of Interest. However, when the agreement was in this or similar forms, "I will restore the pledge when the double sum has been received," the creditor need not restore the pledge before the debt has been discharged. Thus VISHNU, having premised that the creditor must restore the pledge, subjoins the text *above cited* (110).

Many *special* agreements may be *made* in respect of pledges. Some of these shall be *now* mentioned. 1. "This land is mortgaged for a debt "of twenty *suvernas;* when forty *suvernas* have been realized from the use "of it, you must release the mortgage." 2. "If I do not redeem the "pledge when the principal has accumulated to forty *suvernas,* this shall "become thy absolute property." 3. "The pledge shall be enjoyed by "you, until the principal and interest have been realized." 4. "If I do not "then redeem the pledge, when the principal and interest have been realiz-"ed, it shall become thy absolute property." 5. "The pledge shall be "enjoyed by you for ten years." 6. "The pledge shall be released on "the receipt of the principal sum at the end of three years." 7. "If I do "not redeem the pledge at the expiration of ten years, it shall become thy "absolute property." 8. "If I do not redeem the pledge by paying the "principal sum at the expiration of three years, it shall become thy absolute "property." 9. "The pledge shall be enjoyed by thee for three years, I

"will afterwards redeem it by paying the principal sum; if I do not redeem "it at the expiration of the fifth year, it shall become thy absolute property." 10. "Enjoy the pledge for ten years, and you may subsequently enjoy it "*unless I then redeem it*; If I do not redeem it at the close of the twelfth "year, it shall become your absolute property." 11. "This pledge may "be used by thee so long as interest accrues; afterwards, on receipt of the "principal, the pledge must be restored." 12. "If I do not then redeem "it, the pledge shall become thy absolute property." 13. "If I do not "redeem it within two subsequent years, it shall become thy absolute "property." 14. "The pledge may be used until I pay the principal sum." 15. "If I do not pay the principal and redeem the pledge, it shall become "thy absolute property."

"Mortgaging this village or the like, I borrow twenty *suvernas*; from "this village thou shalt receive interest on that sum at the rate of an eigh- "tieth part *of the principal*; the remainder shall be received by me." Ten forms of this agreement, as above stated, make twenty-eight forms.* Again; mortgaging a village or the like, the debtor says, "half or a quarter of the produce of this village shall be enjoyed by you; the rest I will take." Since there are also ten forms of this agreement, forty modes of agreement have been suggested. "Accepting this village or the like in pawn, lend twenty *suvernas*." Forty other forms may be stated in this mode. "Accept this "village in pawn; from its produce supplying the expenses incident to it, "give me ten *suvernas*, and take the remainder yourself." In this mode there may be numerous forms of agreement: and various forms exist in fixing the term of the mortgage and so forth. To avoid prolixity they are here unnoticed, but they are numerous. The law concerning them may be understood by *the* repetition *of the rules delivered respecting others*. But a contract for hypothecating *the merit of* ablutions in the *Ganges*, and the like, shall be mentioned.

The settled law in respect of these *may be thus stated*. Under the first agreement, the sum of forty *suvernas* being completed, if the debtor, tendering the principal sum, offer to redeem the pledge, it must be then released. Such is the opinion intimated in the *Retnácara* by the condition stated (in the gloss on the text 103) "a pledge to be used for an indefinite period." It has been already discussed. But, computing the sum realized from the use of the pledge in the period during which it has been held, and fully liquidating the forty *suvernas*, he may redeem the pledge. According to the *Dípacalicá*, if he do not redeem the pledge when forty *suvernas* have been realized, it becomes the sole property of the creditor.

112.

YÁJNYAWALCYA:—The pledge is forfeited, if it be not redeemed when the debt is doubled: *since it is* pledged for a stipulated period, it is

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* I cannot well correct the obvious error in the numbers: it is unimportant. However, among the fifteen contracts particularized, four, and perhaps the fifth also, cannot be accommodated to this case of specifick interest. We may therefore read twenty-five instead of twenty-eight, and correct the subsequent numbers by reading fifteen instead of ten.

forfeited at that period; but a pledge to be used *for an unlimited time* is not forfeited.

The debt being doubled, if the debtor do not *then* redeem the pledge, it is forfeited to the creditor. A similar exposition is delivered in the *Calpateru.* But HELÁYUDHA says, 'this text concerns a pledge for custody only:' in which opinion the author of the *Mitácshará* concurs. Their notion appears to be this: if a beneficial pledge be not redeemed, although twice the principal have been received from its use, the creditor sustains no loss: why then should it be forfeited? But, since a pledge for custody is not used, why should the creditor long preserve unprofitably the property of another? The pledge is therefore forfeited by a debtor who has stipulated a period for redemption.

Others think, that such reasoning, which is not authorized by the law, may not be trusted. At the stipulated period, whether before or after the principal is doubled, a pledge limited as to time is forfeited, and becomes the property of the creditor: and this concerns the seventh form of agreement. According to this opinion, what is the import of the phrase, "but a pledge to be used is not forfeited?" It concerns a pledge delivered for use, in the fourteenth form *of agreement,* "the pledge may be used until I pay the principal sum."

But, although it be cursorily intimated that both *pledges* become the sole property of the creditor whenever the principal is doubled, provided the debt consisted in shells, whether pledged for use or custody; still, as reasonable practice nowhere in the universe shows the creditor's property without the consent of the pledgor, when brass or the like has been pledged with a special agreement, CHANDÉSWARA, therefore, intimating that it is not admissible in his opinion, by adding "it must be otherwise expounded," himself propounds the case: that is forfeited which has been pledged with a declaration in this form, "if the pledge be not redeemed when the principal is doubled, it shall become thy sole property." Consequently, the second form only is intended by the expression of YÁJNYAWALCYA, "the pledge is forfeited."

This is founded only on the inconsistency of *a different* practice. Thus, under the first form of agreement, if the pledge be not redeemed after the double sum has been realized, a moveable pledge may be used, notice being given to the debtor or his family (119). The debtor's property is not then forfeited, for there is no proof *of such forfeiture;* and nothing opposes this application of the phrase, "a pledge to be used is not forfeited." But immoveable property should be restored when the double sum has been realized. Such is CHANDÉSWARA's opinion, and that is proper; for the land or other thing which is pledged belongs to the debtor while it remains a pledge, as much as it did before; but he cannot dispose of it at pleasure, while it is a pledge: how then should the debtor's property be devested when the principal is doubled, since there is no efficient contract in the nature of gift or sale? It should not be objected, that, under the authority of the text, the forfeiture of property *in a pledge* unredeemed is acknowledged in the *Mitácshará.* That is improper, since it is difficult to deduce a forfeiture not previously stipulated, from a text which may be otherwise expounded. It should be affirmed, that forfeiture of property only takes place *in cases intended* by the text of YÁJNYAWALCYA on Title by Long Possession.

113.

YÁJNYAWALCYA :—He who sees his land possessed by a stranger for twenty years, or his personal estate for ten years, without asserting his own right, loses his property in them.(47)

For YÁJNYAWALCYA, in a subsequent text, declares property not forfeited in certain cases.

114.

YÁJNYAWALCYA :—Except pledges, boundaries, sealed deposits, the wealth of idiots and infants, things amicably lent for use, and the property of a king, a woman, or a priest versed in holy writ.*

This also is subsequently mentioned by CHANDÉSWARA. What is propounded by the Sage (112), states the cause; "pledged for a stipulated period, &c." that for which a specifick term was settled, when his own pro-

(47) This is the rule of limitation according to Hindu Law, as regards real and personal property. Pledges, however, are excepted from the operation of this rule ; but the exception must be understood to relate to such as are in the hands of the pledgee.

Though the default of the debtor, in not delivering the pledge, does not exonerate him from discharging the debt, still the lapse of time might be taken advantage of against the creditor, who should sue for the possession of the pledge which was withheld, (b. I, v. 126, *infra*) within the period mentioned in the text cited above.

If the creditor have possession of the pledge, or a lien on it, he should proceed in the manner indicated in the passages of YÁJNYAWALCYA—(Ibid., v. 123): In no case can the pledge be forfeited without that formality, or a time allowed to the debtor, as directed by VRÍHASPATI and VYÁSA—(Ibid., v. 115, 116;) which implies notice to him. If he have not possession, he, of course, could not foreclose,—without notice and application to a tribunal.

In the case of *Sayad Ghoolam Raza* v. *Aja Bhaee* and others, it was ruled by the Sadr Court at Bombay, that if the owner of real property, whether land or other, allow another to hold it for three generations under any deed, without claiming it, such property becomes lost to him, and ownership accrues to the person in possession. 1 BORRADAILE, 367. But as three generations may lapse in two or three years, it is provided by the Sastra that the actual possessor's ownership shall ensue if the property has been held for any time after the *Smártha Kála*, or extreme age of man. In the *Mitácshará*, the period of one hundred years is defined to be within the memory of man, from the text, "The age of man extends to one hundred years :" but CÁTYÁYANA and VYÁSA, however, state sixty years as the time when three generations may be said to have passed over, and after which the claim of the original proprietor is null and void. *Ibid.*, 1 MACN : *Prin. H. L.*, 214,215,233. 2 Do. 269. Case VII. *Mayukha* C.II, S. II, 2 *et seq.* MACN. *Cons. H. L.*, 424,431,432. In connection with the foregoing subject, the following observations of the learned GROTIUS touching upon a similar point, may be appropriately quoted : "Quia vero tempus memoriam excedens quasi infinitum est memoraliter ; ideo ejus temporis silentium ad rei delicturæ conjecturam semper sufficere videbitur, nisi validissimæ sint in contrarium rationes. Bene autem notandum est a prudentioribus jurisconsultis non plane idem esse tempus memoriam excedens cum centenario quanquam sæpe hæc non longe abeunt, quia communis humanæ vitæ terminus sunt anni centum, quod spatium ferme solet ætatis hominum aut γενεας tres efficere: quas Antiocho Romani objiciebant cum ostenderent repeti ab eo urbes quas ipse, pater, avus nonquam usurpassent,—GROTIUS, *de Bello et Pace*, *Lib.* 2, *Cap.* IV, 7.

In the early ages of Rome, the Twelve Tables declared. "*Usus auctoritas fundi biennium cæterarum rerum amicus usus esto.*" The possessor of three acres would not be long in discovering that another had taken possession of one of them. But when the possession of the Romans increased, the term of prescription was extended to ten years. The Emperor JUSTINIAN, fixed three years for moveables, ten years for immoveables, unless in case of absence, in which event twenty years were requisite for a *bonâ fide* holder. After undisturbed possession of thirty years no suit could be instituted against the holder. The prescription against the Church was prolonged to forty years ; and against the Church of Rome to a hundred. *Cod de Præscript*,—Vide PHILLIMORE, *Principles and Maxims of Jurisprudence*, p. 181, &c.—EDITOR.

* The last hemistich was not cited in this place.

perty should be devested, and property should be vested in the creditor, is forfeited at *the expiration of* that term. In whatever case, and in whatever mode, the owner has agreed to the forfeiture of his own property, and the *consequent* property of another, so shall it of course be. The period, in which the principal is doubled, is a specifick term: this also is a stipulated term. Not fearing repetition, *the Sage* has assigned a cause *of forfeiture.* Thus *may the law be* concisely *expounded.*

"A pledge to be used is not forfeited;" a pledge to be used for an unlimited time is not forfeited, even though *unredeemed* for a thousand years. But if a period be stipulated, other texts are founded *which provide for that case.* The *Retnácara.*

Since there can be no enjoyment of produce from a pledge for custody only, a pledge for use is meant. "For an unlimited time;" a pledge for which no time has been stipulated, when the owner's property shall be devested, and property be vested in the creditor. "But, if a term be stipulated; if a pledge be delivered with a term fixed for annulling his own property, and vesting property in another, other texts of Sages, quoted or unquoted, are found, *which provide for that case.* Consequently, whatever text declares the creditor's property in the pledge, concerns this alone. Even where the principal sum has been doubled, and the forfeiture of property has been stipulated, VRĬHASPATI propounds a legal period *for the equity of redemption.*

115.

VRĬHASPATI:—After the time for payment has past, and when interest ceases *on becoming equal to the principal,* the creditor shall be owner of the pledge: but the debtor has a right to redeem it before ten days have elapsed.

116.

VYÁSA:—Gold being doubled, and the stipulated period having expired, the creditor becomes owner of the pledge after the lapse of fourteen days.

2. But a pledge to be used, of which the term has elapsed, the debtor shall *only* recover, on *then* paying, from other funds, the exact amount of the principal.

"After the time for payment has past;" when the term, which was settled in regard to the pledge, is completed. For example, ten years, or the like, in the 7th form of agreement; three years, or the like, in the 8th; five years, or the like, in the 9th; twelve years, or the like, in the 10th; two years after interest has been fully liquidated in the 13th; and, even in the 14th form, any time subsequent to the payment of the principal sum: in these and similar instances the period expires. How can it happen that a man should have paid the principal, and not have redeemed the pledge? It may happen when the principal sum has been anyhow received through the intervention of another, but the debtor, apprehensive *of punishment* on account of some offence, has absconded.

"When interest ceases;" when the principal is doubled: and this concerns the second form of agreement above mentioned. "After the time for payment has past;" in this case a term different from the period when interest ceases should be understood, by the same rule with the expression "bring the kine and oxen."* The construction of the phrase is, the creditor shall be owner of the pledge.

"Before ten days have elapsed;" does not this concern the case, where it is agreed, "if I do not redeem the pledge within ten days after the principal is doubled, it shall become thy absolute property?" This should not be affirmed; for it would be inconsistent with practice. When no such agreement is made, the interval of ten days is nevertheless required: and that would be inapplicable, when the term was past. Such is the mode of interpretation consistent with the gloss of the *Retnácara.*

The interval of ten days, ordained by VRĬHASPATI, must be understood of a debtor who resides at home. But if he do not, VYÁSA propounds the rule (116). "Gold being doubled," has the same import with the expression "when interest ceases." "The stipulated period being expired;" when a term has been fixed in regard to the pledge, and that term is past. It corresponds with the preceding text. The subsequent verse (116, 2) is intended for another distinction. "The exact amount;" that is, without interest. The *Retnácara.*

Consequently this concerns the fourth, eighth, and fifteenth forms of agreement.

Here an observation should be made. If the debtor happen to have gone to a distant country, or be dead, and his son or other heir be not yet capable of business, or if the debtor be a captive; even in these, and similar cases, no law ordains that the property shall not vest in the creditor when the term of the mortgage is expired. It can only become the property of the debtor, or of his son, when the creditor, through tenderness, or at the intercession of others, restores it. But when the agreement runs in this form, "If I remain in my own country, and do not redeem the pledge, it shall become thy absolute property;" then, should the debtor reside in a foreign country, he does not forfeit *the pawn.*

If the creditor reside in a foreign country, the mode of proceeding has been mentioned (104 and 106). But if the chattel happen not to be appraised on that day, witnesses must be taken of the debtor's going to the creditor's house for the purpose of redeeming the pledge. To this proceeding there is no objection. If a dishonest creditor suffer the remaining days of the period to elapse, and his fraudulent practice be proved, and the debtor's going to the creditor for the purpose of redeeming the pledge be also substantiated, no loss is sustained by the debtor. Again, if the creditor and his family were then absent in a foreign country, but the debtor go to him on his return from abroad, we argue that there is no offence if the debtor afterwards go abroad. More would be superfluous.

Under the first, third, fifth, eighth, and eleventh forms of agreement, if the pledge be long unredeemed, may, or may not, the creditor hypothecate it to another, or sell it? In all forms of agreement, is a sale valid, which is made on the supposition of property, in consequence of long enjoying the pledge?

* Where one term is generick, and the other specifick. T.

117.

MENU:—If he take a beneficial pledge, he must have no other interest on the loan; nor, after a great length of time, *or when the profits have amounted to the debt,* can he assign or sell such a pledge.

The first hemistich has been expounded (91), as forbidding other interest, when the use and profit of a pledge has been settled as the only interest. The last hemistich determines the two questions proposed.

"After a great length of time;" when it has long remained. "Assignment;" in pledge to another. "Sale;" an act devesting his own property. However long it have remained, a pledge received, and left in his possession after he has himself asked money *of the debtor*, must not be assigned *by the creditor* in pledge to another person for a larger sum. The *Retnácara.*

'Assignment in pledge to another;' consequently, so long as the debtor's property subsists, a creditor must not assign, as a pawn to another for money borrowed, a chattel pledged by his debtor. This text is expounded in a similar manner in the *Méd'hátit'hi,* and by GÓVINDA RÁJA. VÁCHESPATI MISRA and BHAVADÉVA also concur in this interpretation.

'An act devesting his own property:' sale is a contract annulling the party's own property in his chattel after receiving a price; but, in this definition, an act devesting his own property *simply* is expressed by the word sale: it consequently suggests a gift or absolute barter. The ox, pledged to, and possessed by me, shall be this day employed in burden by you; but tomorrow your ox shall be employed by me: such an exchange for one day is neverthelesss unexceptionable. This *appears to be* meant in the *Retnácara.*

'After he has himself asked *money of the debtor;*' when the creditor demands money of the debtor, but he, though required, pays not the money nor receives back his pledge; then, if the creditor, impelled by poverty, attempt to assign that same pawn to another person for money borrowed, the text prevents him. But HELÁYUDHA explains "assignment" gift. In this opinion, the creditor may receive a loan from another person, assigning the pawned chattel in pledge to him. CULLÚCABHATTA also intimates, that the assignment of a pawn to another is unexceptionable, by adding, "for usage allows hypothecation of mortgaged land or the like to another person."

On this interpretation, if the creditor contract a debt, assigning mortgaged land or the like to another, then, should he haply be unable to discharge his own debt, and the *original* debtor come to redeem his pledge, how should the matter be adjusted? On this it is correctly said, if a pledge for custody be transferred as a pawn to another, and the debt be less than the former one, or equal to it, then, discharging his own debt with the money paid by the original debtor, and *thus* redeeming the pledge, he should restore it to the owner. But a pledge should not be transferred as a pawn for a greater debt: this is expressly stated in the *Retnácara* and other works; "a pledge must not be assigned for a larger sum." It should also be considered as meant in the *Méd'hátit'hi,* and by GÓVINDA RÁJA.

If the pledge were for use, it should be transferred without any contradiction to the *former* agreement. For example; it should be assigned by the original creditor, with a declaration in this form, "the pledge shall be used so long as I do not cause the original debtor to pay the principal sum

now borrowed;" not in this form, "it should be enjoyed ten years or the like." Yet if that be done by any careless person, let the pledge be lodged in the hands of the ultimate creditor, with the consent of the first lender, along with a certificate of its value at the time, settled by an appraisement made and signed by five persons. But, in fact, should a creditor transfer a pledge which he has received on dissimilar terms, he shall be punished. In the same mode should the decision be also argued in other cases. But the word "assignment" is properly expounded as signifying hypothecation; for, in certain cases, hypothecation is forbidden, and gift may be comprehended in the definition of sale. To include permanent barter, the word sale must be taken in a secondary sense.

This text is founded on reason or immemorial usage. If a creditor therefore, in breach of this law, transfer a pledge which he had taken, a moral offence is not imputed to him, but the chattel must necessarily be restored to the debtor when he offers to redeem it (104); if the last lender refuse to release the pledge, the original creditor may be put to much trouble, or sustain a loss: this should be understood. But the last creditor is only enabled to exact another pledge from the original lender, or payment of the principal and interest, not to refuse the release of the pledge. Should the creditor, in breach of this law, absolutely give it to any person, the gift is not valid; whence then should any benefit, arising from the gift, be even supposed? For he has no property in the pledge, since it has not been relinquished by the debtor; but its use alone has been conceded to him. "Who can benefit by giving away the property of another?" This text forbids a pretended gift. The sale of a pledge will be considered in the Chapter on Sale without Ownership.

Mortgaged land or the like should be carefully preserved by the creditor; it should not, *by any means*, be neglected. A debtor mortgages land for the debt contracted; the creditor uses it a few years, and afterwards another possesses it without any opposition from him. In such a case, the debtor could not redeem the mortgaged land, which had been possessed for twenty years; for he is poor: but sees the land possessed by a stranger, yet asserts not his title, erroneously thinking his opposition improper, because a stranger possesses it. Afterwards, when a law-suit is instituted, the possessor having acquired a title by undisturbed possession for twenty years, the land cannot be restored to the debtor offering to redeem the pledge, and the creditor must give other land as an equivalent. Therefore it should not be neglected. This some remark.

But others ask, why does not the debtor oppose *adverse possession?* Since the pledge is lost by the fault of the debtor, an equivalent in land need not be given by the creditor. If the possessor, though verbally forbidden, do not refrain, what can the debtor say when he applies to the king? He may say, "this violent man possesses my land mortgaged to another; if the occupant be not now restrained, he will, after long possession, assert a title, because he may have possessed it twenty years." The debtor's not applying to the king is therefore an evident fault; why should the creditor give an equivalent for land lost by the debtor's fault? But if the possessor, attending the court, affirm, that the pledgee gave him possession, and that plea do not then appear to be false; in such a case indeed the pledge is lost by the fault of the creditor alone: it is therefore proper he should give an equivalent.

Others again hold, that the text of YÁJNYAWALCYA (114) being equally applicable to a pledge received by another as to a pledge received by the possessor himself, no title to that land is gained by *adverse* possession for twenty years. On this account neglect has not been included *in the text* by the author of the *Retnácara* and the rest. The justness of these opinions should be examined under the head of Title by Long Possession: more would be here superfluous.

The term (translated "assignment") may signify the nature of the thing. For example, a bracelet, an earring, or the like, made of gold, should not, by exposure to the fire, be reduced to gold bullion, *which is its natural form:* and the alteration of a pledge is forbidden by the word "and," *which bears the sense of "and the like."*

But hypothecation is not forbidden in all cases. For instance, one has contracted a debt, delivering a pledge on these terms, "the pledge may be used so long as I do not pay the principal sum:" after a few years the creditor demands the debt from the debtor, but he is unable to discharge it; the creditor therefore assigns the pledge to another on similar terms, and borrows an equal sum. Such cases occur in practice.

This text (117), according to CHANDÉSWARA, VÁCHESPATI, BHAVADÉVA, and others, concerns a pledge for use or custody with no special agreement. But the author of the *Calpateru* says, it concerns a pledge to be used. This is mentioned on consideration of the chief intent of the text, but with no view of restricting it to pledges for use. CHANDÉSWARA so expounds the text. But the author of the *Mitácshará* holds, that it solely concerns pledges for use; this is only suitable on his interpretation.

A certain author has thus expounded the text: since a period has been specified, no assignment or sale of a pledge should be made by the debtor within the stipulated period. He thinks that the creditor, having no property in the pledge, could not be supposed entitled to give or sell it; a prohibition would be therefore impertinent. It should not be objected, that this would contradict the text, "if a pledge be sold, the sale shall be valid;" since the sale of mortgaged property, being forbidden, could not be valid: the difficulty, *he thinks*, is removed by referring that text to a pledge unlimited as to time. But this does not coincide with the opinion of CHANDÉSWARA and the rest: because, in the first hemistich (117), an agent being sought for the phrase "must have no other interest," the creditor is of course suggested as the agent: here also, it being questioned who cannot sell the pledge, the same person, already suggested, must be the agent *in the sentence:* accordingly the gloss of the *Calpateru*, *Párijáta*, and *Mitácshará*, must be supplied with the words "shall not be made by the creditor."

When a debtor, having mortgaged land or the like to a creditor, sells the same property, or absolutely gives it away to another; then, since co-existent mortgage and sale, or mortgage and gift, are incompatible, it will be stated, under the title of Comparative Force of Contracts, that the latest contract, whether sale or gift, is valid. Hence the gloss, which supposes gift or sale by the debtor prohibited, is irrelevant. It should not be objected, how can gift or sale be valid, since, by stipulating a specifick period, the owner has conceded his independence? Although he be not independent, his property subsists. Consequently, the efficient validity of sale or gift is uncontroverted, if it be said, as the debtor's property in the pledge was absolute, so shall be the buyer's or donee's: and authors have not

stated as unfounded the text, "an unredeemed pledge shall either be sold nor given away." Such is the mode of interpretation agreeable to the gloss of CHANDÉSWARA: VÁCHESPATI and BHAVADÉVA concur in the same exposition.

The text of YÁJNYAWALCYA (112) concerns the case of an agreement in the second form, "if I do not redeem the pledge when the double sum has been realized, it shall become thy absolute property." The text of MENU, "nor, after a great length of time, can he assign or sell such a pledge" (117), concerns the case of an agreement in the first form, where the clause, "it shall become thy absolute property," has not been inserted. No contradiction can be supposed between these two forms of agreement.

In all agreements for a definite time, if the debtor wishes to redeem the pledge within the stipulated period, by paying the principal and interest, VRĬHASPATI propounds the law for that case.

118.

VRĬHASPATI*:—When a house or field, mortgaged for use, has not been held to the close of its term, neither can the debtor obtain his property, nor the creditor obtain the debt.

2. After the period is completed, the right of both to their respective property is ordained; but, even while it is unexpired, they may restore their property to each other by mutual consent.

"For use;" the seventh case has a casual sense. Consequently the meaning is, a house or field which has been mortgaged for use. "When that has not been held to the close of its term;" when it has not reached the full term: neither can the creditor then recover the debt, nor the debtor obtain his mortgaged property. Consequently, from this result, that, while the period is incomplete, the debtor shall not obtain his pledge, nor the creditor recover the debt, it follows, that the wish of recovering the pledge is ineffectual. After the period is completed, the right of both the creditor and debtor to the money lent, and to the pledge respectively, that is, the free use of their own, is *in full force*. Consequently the creditor has a right to the money lent, and may use it as his own, at the full term; and the debtor has the same right to the property mortgaged. Yet, even while the period is unexpired, if the creditor voluntarily accept payment of the debt, and restore the pledge, or if the debtor freely discharge the debt to recover the pledge, the debtor's right to the pledge, and the creditor's right to the money lent, are immediately efficient. The Sage declares it, "but even while it is unexpired, &c." they may act by mutual consent; may accept the debt, and receive back the pledge: with the consent of the creditor, the debtor may take his pledge; and with the consent of the debtor, the lender may take his money. Consequently, while the period is unexpired, the debtor's wish to recover his pledge is fruitless, without the consent of the creditor; and the creditor's wish to obtain the money, without the consent of the debtor: but, with the consent of both parties, it is effectual. Such is the interpretation according to the gloss delivered in the *Retnácara*.

* The first verse has been already cited and numbered 105.

In some parts of the *Retnácara* the last hemistich is found *with this reading*, "but, even while it is unexpired, they must perform what was agreed by both parties." That is not found in the *Chintámeni*, nor is it quoted by BHAVADÉVA, nor inserted in the *Mitácshará*. If *this reading be* well founded, the sense is this: were it declared by the debtor or creditor, at the time of contracting the debt, "even before the period expire, if the principal and interest can be paid, the pledge must be restored;" in such a case, the pledge may be restored, and the debt be discharged, even while the period is unexpired. If this reading of the last hemistich be unfounded, the same sense may be deduced from the phrase "by mutual consent." For the mutual agreement of the parties when the loan was advanced, as well as consent when payment is tendered, may be signified by the words "mutual consent."

If the agreement run in this form, "take this land as a pledge, and lend me twenty *suvernas*;" when should the pledge be redeemed? On this point it is said, such being the words uttered by the borrower, the lender must ask, "how long shall I use the pledge?" In answer to which, the borrower specifies a term. When the debtor has been long in the habit of receiving and repaying loans *of the same creditor*, then, nothing being expressly declared, there is no tacit agreement in regard to the term; consequently, this agreement falls within the forms above mentioned. Or, should it anyhow exceed that enumeration of forms, the pledge must be restored when the double sum has been received; for it is of course legally fit that a pledge be restored after the double sum has been received.

Under the general law, that a pledge shall be used until the debt be repaid (111), is not the use of the pledge proper until the principal sum be discharged? No; from the coincidence of the text of CÁTYÁYANA, v. 37, 3, (where the use of a pledge for a loan made with an agreement, that the whole use and profit of the pledge shall be the only interest, is denominated interest from the use of the pledge, and which is also called interest by enjoyment,) this text (111) must be referred to the same case. It should not be objected, that there is no argument for the restoration of a pledge, in such a case, after the double sum has been realized. The text of YÁJNYAWALCYA (46) is authority for such an induction. Nor should it be objected, that this contradicts the text of VISHNU (110). That text is limited to immoveable property. Nor should it be asserted, that the word "immoveable" is merely illustrative of a general sense. There is no proof *to support such an assertion*; nor any grounds for restricting the text of YÁJNYAWALCYA. A pledge unlimited as to time must therefore be released when the double sum has been realized, provided it consist of moveable property; but immoveable property, under the authority of the law, may be used so long as the principal remain undischarged. Even though it be not then redeemed, the debtor does not forfeit his property in the pledge; for the text (112) concerns the case of an agreement containing a clause to this effect, "it shall become thy absolute property." But, if the debt be contracted on a pledge given for confidence only, without *such* a special agreement, the debt should be recovered by the same mode of recovery as ordained for debts unsecured by a pledge.

A pledge delivered by the pledger, to give confidence to the lender, must be carefully preserved by the creditor, and be restored on receipt of the whole sum due. The *Retnácara.*

Consequently, in the case of a pledge to be used, since the creditor may derive benefit from the use of it, he has no solicitude in regard to the payment of the money. But, in the case of a pledge to be kept only, the creditor derives no benefit from the pledge; on the contrary, he has the trouble of keeping another's property; he may therefore be anxious to recover his money: but, since there is no other mode, he must adopt one of the five modes of recovery, that which is consonant to moral duty, suit in court, legal deceit, lawful confinement, or violent compulsion: and, in such a case, the time for recovering the debt is that which was stipulated by the borrower for the payment of the debt; or, if none were stipulated, the period when the debt is doubled; for that is prescribed by law as the time for redeeming a pledge. This is consistent with reason: and this mode of proceeding, say some lawyers, supposes a case where the use of the pledge has been forbidden; or it supposes the case of a pledge consisting of masses of iron, and the like.

But, if the debtor be absent, having absconded, or the like, from whom shall the creditor recover his money? A text of law, cited in the *Retnácara*, provides for this case.

119.

Smrìti:—After giving notice to the debtor's family, a pledge for custody may be used when the principal is doubled, and so may a pledge for a limited period when that period is expired.

When the principal is doubled, a pledge for custody may be used after giving notice to the debtor's family in this form:. "Having borrowed money "from me, but not having yet redeemed the pledge, the debtor has absented "himself, and the principal has been now doubled by the interest: thou "art his heir; I therefore give thee notice, as required by law, that hence-"forth the pledge will be used by me." The Sage's meaning is this; if the debtor's heir himself pay the debt to the creditor, and take the pledge; or if he say, "wait a few days, I shall send information to the debtor;" the pledge must not be then used. But if the heir do not redeem the pledge, nor give information *to the debtor*, then, taking the attestation of several persons, the creditor may use the pledge.

"A pledge for a limited period;" a pledge, for which a specifick period has been fixed, may be used after that period has expired, notice being first given to the debtor's family. Such is the sense of the text.

The use of a pledge delivered for use may be renewed: if it be agreed, "the pledge shall be enjoyed for two years; afterwards, paying the debt, I "will redeem this pledge delivered for use; the use of the pledge shall cease "at the close of that period:" in such a case, if the debtor, happening to go to another country, be absent, and the debt be not paid, nor the pledge redeemed, then the use of the pledge is authorized after notice given to the debtor's family. What is said by the author of the *Retnácara*, ('this authorizes the use of a pledge delivered for use, without however conveying the absolute property, if no period were stipulated,') intends generally any moveable pledge for use under such circumstances. But immoveable property being pledged for use, must only be relinquished, if it were agreed, "I will restore it when the principal is doubled, or the like;" for, since it cannot move to another place, there can be no apprehension of its being

seized by another person. But moveable property must be preserved with the utmost care, until it be restored to the debtor.

In the present case, after notice given to the debtor's family, the use of the pledge is to be taken as wages *for the care of it*. This is intended by the text. Here "the debtor's family" is merely an instance of a general injunction: therefore, if the debtor himself be present, but procrastinate the redemption of the pledge, it is reasonable that the creditor should use it after giving him notice; and this may be equally affirmed of pledges for custody, and pledges for use: it should be *so* argued if the agreement be in the sixth or other similar form above stated, and sometimes also in other cases.

It appears from the term "may be used," and from the gloss, "this authorizes the use of a pledge, without however conveying the absolute property," that the creditor shall only use the pledge: he has no property therein. Consequently, although the creditor use the pledge, it must be restored to the debtor returning after the lapse of several years. Such is the sense of the law.

In such a case shall the principal sum be received by the creditor with the whole interest? To this question the answer is, it appears from the conditions in the text of VRĬHASPATI (92), "before interest cease on the loan, or before the stipulated period expire," that there is no forfeiture of interest in consequence of using a pledge for custody after the period has elapsed, or the like. But, in the case of clothes and similar things, since they would be totally spoiled by use, it is reasonable that the principal and interest should be forfeited *in consequence of using them.*

But if the debtor die, or abscond, and notice cannot be given to his family, what is to be done? A text quoted in the *Retnácara* provides for that case.

120.

Smrĭti:—If the debtor be missing, or dead, let the creditor produce the writing *in a court of justice*, and obtain a certificate from the court, specifying the period which it bore.

Let the creditor produce the writing in the king's court, and there obtain a document specifying the term which it bore; let him there obtain a certificate. A creditor using a pledge after such *precaution*, commits no offence. The *Retnácara*.

The meaning is this: when a debtor is missing, or has absconded, the pledge may be used after notice given to the debtor's family, as ordained by the preceding text; but, if notice cannot be given to his family, then, producing the writing in the king's court, let the creditor obtain a certificate. If the debtor be dead, the pledge may be used after notice given to the debtor's family, as is signified in the preceding text; yet, if notice cannot be given to the debtor's family, but heirs of the debtor exist in some *other* country, let the creditor produce the writing in the king's court, and obtain a certificate. Such is the sense of the text.

The certificate is delivered by the king conditionally; it should express, "until the debtor or his heir attend, the pledge shall remain with thee, and shall be used by thee." "A certificate from the court;" a writing certifying

the continuance of the pledged property with the creditor. That the pledge shall be used, appears from the expression in the *Retnácara*, "a creditor using a pledge after such *precaution*, commits no offence." But if neither the debtor nor his heir be *living*, the mode of proceeding in that case will be subsequently mentioned from a text of CÁTYÁYANA.

121.

VRĬHASPATI, cited by MISRA and BHAVADÉVA, under the title of Recovery of Debts :—When the debt is doubled by the interest, and the debtor is either dead, or has absconded, the creditor may attach his *pledge, or the debtor's* chattel, and sell it before witnesses :

2. Or having appraised it in an assembly of good men, he may keep it ten days; after which, having received the amount of his debt, he must relinquish the balance *if there be any:*

3. Having ascertained his own demand by the help of men skilled in arithmetick, and taken the attestation of witnesses, he commits no offence by thus recovering it.

These texts are also cited in the *Retnácara*, but the reading is *tad bandhujnyátividitam*, instead of *taddhanam jnyátrĭviditam*, and it is expounded, "notice having been given for the assurance of the debtor's relations."*

122.

CÁTYÁYANA :—When the pawnor is missing, let the creditor produce his pledge before the king; it may be then sold, with his permission : this is a settled rule :

2. Receiving the principal with interest, he must deposit the surplus with the king.

These texts of VRĬHASPATI (121) are contradicted by the text above quoted (120); for that text suggests, that if the debtor be not present, the pledge should be used after obtaining the king's sanction; but the text of VRĬHASPATI suggests, that the pledge may be sold if the debtor be not present: consequently, there is an evident contradiction in authorizing the use and the sale of the same thing in the same case. An alternative is therefore allowed in this case by the system of civil law; for an alternative is true in logick when the matter is totally optional. Consequently, when the debt is doubled, and the debtor is not present, being dead, or having absconded, the creditor may use the pledge after giving notice to the debtor's family; if notice cannot be given to the debtor's family, the creditor may exhibit the writing before the king, and use the pledge with his permission : this is one option. Or waiting, or not waiting ten days, he may sell the pledge : this is a second option.

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* See a further comment on these texts after v. 291.

The text of VRĬHASPATI may be thus expounded: "When the debt is doubled by the interest;" this is a general illustration, the same must be understood when the period has expired. It is a mere instance: the case described relates only to silver coins and the like; but if grain or other commodities were lent, it should be said, when the principal is quintupled or the like. "And the debtor is dead," or has gone to another country, "or has absconded;" that is, cannot be found, because he conceals himself. But if the debtor live in another country, and some person who is his heir say, "let the sale be postponed for ten days, I will fetch the debtor, or bring money from him and redeem the pledge;" in that case the creditor should keep the pledge ten days, but he should previously appraise it. The words "ten days" are merely illustrative; in proportion to the number of days in which the debtor can arrive, so long should he keep it, as awarded by arbitrators.

If the value of the pledge exceed the amount of principal and interest, what should be done? The Sage declares, he should take the amount of his debt and no more. What shall be done with the surplus? The Sage declares, "he must relinquish the balance;" he must deliver it to the heir, or to the king. The text is so expounded by BHAVADÉVA.

"*Jnyátrividitam* (according to one reading of the text), known to witnesses;" having taken the attestation of witnesses. Consequently the taking *of a pledge in payment of a debt* should be attested, as well as the sale of it. "He commits no offence;" VÁCHESPATI expounds the word in the neuter sense: a creditor recovering his debt, even by compulsion or the like, shall not be punished by the king.

123.

YÁJNYAWALCYA:—Or, even in the absence of the debtor, the creditor may sell the pledge before witnesses.

If the debtor or pawnor be not *present*, then, selling the pledge and taking the amount of the debt, the creditor should deliver the surplus to the heir, or to the king. The *Dípacalicá.*

The meaning is this: if the debtor live in another country, or happen not to be present, the creditor should deliver the balance of the price to the debtor's son, brother, or the like, before witnesses, that the debtor may receive it when he returns. This appears from the gloss of BHAVADÉVA and of the *Dípacalicá*. As a debtor, if the creditor be absent, deposits the amount of the debt with his son or other heir, so the creditor, if the debtor be absent, deposits the balance of the price obtained for the pledge with his son or other heir. This also is founded on the gloss of BHAVADÉVA and of the author of the *Dípacalicá*. If there be no heirs, or if they be absent, or if they refuse to receive it, he should deliver it to the king (122).

"When the pawnor is missing (122);" when he cannot be found, being dead, having absconded, or having gone to a distant province, the debt being doubled by the interest, let the creditor apply to the king, and also produce the writing: this must be understood. "With his permission;" with the king's consent to the sale, the pledge may be then sold: the text must be so supplied. After which, taking no more than the principal and interest of the debt from the price for which the pledge is sold, let him deliver the balance to the king. This distinction occurs: if the debtor be

actually living in another country, it is merely intrusted to the heir, or to the king; but if he be dead, the creditor should give it to the heir, or, on failure of heirs, to the king. This is reasonable: a debtor having delivered a pledge to a creditor, has property in the pledged chattel so long as he lives; afterwards, his property being devested by death, property vests in his heir; it is therefore proper to give his chattel to him. On failure of heirs, property vests in the king; but under the rule of VISHNU (Book V, v. 417) the failure of heirs signifies the failure of fellow-students. Accordingly CHANDÉSWARA, in expounding the text of CÁTYÁYANA (122), delivers this gloss, "when the pawnor is not living, nor any person entitled to inherit from him." But the *escheated* pledge of a *Bráhmana* must be given to learned men, or to priests, under the text of DÉVALA (Book V, v. 445). All this will be discussed under the title of Inheritance.

124.

YÁJNYAWALCYA:—A debtor shall be compelled to pay, with interest, a debt contracted on the pledge of religious merit; and he shall be compelled to repay two-fold a debt contracted on a chattel *of small value* delivered with a solemn asseveration.

"Religious merit;" the use of sacrificial fire, ablutions in the Ganges, and the like: what is received on such a pledge must be repaid with interest. What has been lent on a pawn of small value, delivered with a solemn asseveration, in this form, "it shall certainly be redeemed by me," must be repaid two-fold, if the debt remain long due; the pledge shall not be sold by the pledgee.

It is noticed in the *Dípacalicá*, that the text is read in the *Viswarúpa*, "*charitra*" instead of "*cháritra*." The commentator's opinion is this: *charitra* signifies act or practice; *cháritra* has the same signification; the meaning therefore is, what is borrowed on the pledge of ablutions in the Ganges or the like.

Ablutions in the Ganges, and other religious acts, are pledged when the debtor, on contracting the debt, says, "until I repay thy loan I will not bathe in the Ganges." The term "use of sacrificial fire," relates to the voluntary use of it *on special occasions*, not the continual use of it *by those who maintain a perpetual fire*. Here ablutions in the Ganges and the like constitute a beneficial pledge to be kept only, not a pledge to be used; since the debt therefore is not discharged by the use of it, how shall it be discharged? The Sage therefore ordains, that he (the king) shall compel the debtor to pay the debt with interest. The meaning consequently is, that payment shall be enforced by the king.

CHANDÉSWARA delivers a similar gloss, but he reads the text (*as in the Dípacalicá*) *charitra bandhaca crĭtam*, and expounds it, "for if ablutions in the Ganges be not performed, the king shall compel the debtor to pay the debt with interest."

"When ablutions are not performed;" they are hypothecated, and therefore not performed. We explain *charitra*, ablutions in the Ganges and the like; *cháritra*, the benefit arising from such *ablutions*. When that is pledged "*the debtor shall be compelled, &c.;*" for instance, when a debt is contracted with an agreement in this form, "if I do not repay thy loan, the benefit of my ablutions in the Ganges shall accrue to thee." But this can

only be a pledge for custody, for it would be lost *to the debtor* were it enjoyed *by the creditor ;* the debt must therefore be discharged as in the case of pledges for custody : the pledge is not forfeited. The author of the *Mitácsharà* delivers a similar exposition.

" A pawn of small value ;" a pledge, of which the value does not exceed twice the amount of the debt. This half of the text (124) restrains a creditor who might attempt to sell the pledge, on this reflection ; " twice the amount of the debt is receivable by me, what objection therefore can the debtor have to the sale of this pledge ?" The meaning is, since no agreement was made, when the debt was contracted, to authorize a sale, how should the pledge be sold ? This must be understood when the pledge is not redeemed after the principal is doubled. However, there is no offence in a sale made, after application to the king, with the king's permission.

We hold, that, when no pledge is delivered by the debtor, but he solemnly promises, at the time of receiving the loan, " I will assuredly repay thee thy loan," then conscientiousness is in reality his surety. In that case, on proof of the debt, he shall be compelled by the king to pay twice the amount. To enlarge on this subject would be superfluous.

On this text the author of the *Mitácsharà* thus comments : " A pledge by *the* act *of the parties* is *charitra bandhaca.* Consequently, when a pledge of greater or less value is taken with the free consent of the debtor or creditor, the double sum only shall in that case be received by the creditor ; that is, the pledge shall not be forfeited. At the period when the principal is doubled, the double sum only shall be paid ; there shall be no forfeiture of the pledge. In the case of earnest also, there is no forfeiture of a pledge." This is only suitable on his interpretation. He expounds the terms of the text otherwise (" earnest delivered," instead of " solemn asseveration") ; this other subject is incidentally introduced under the title of Pledges. He adds, when the merchant who buys a commodity, giving earnest to the merchant who sells it, concludes a bargain for the purchase of goods amounting to a thousand *mudras,* if the buyer break the agreement, *the earnest* shall be forfeited ; if the seller break the agreement, it shall be repaid two-fold.

SECT. III.—*On the Validity of Hypothecation and Mortgage.*

125.

VYÁSA :—Pledges are declared to be of two sorts, immoveable and moveable; both are valid when there is actual enjoyment, and not otherwise.

And this concerns a pledge delivered for use.

126.

VRÍHASPATI :—Of him who does not enjoy a pledge, nor possess it, nor claim it *on evidence,* the written contract *for that pledge* is nugatory, *like a bond* when the debtor and witnesses have deceased.

Here, *terms of comparison,* as and so, must be assumed. " When the debtor and witnesses have deceased ;" when neither the debtor nor the

witnesses exist. Hence, as a writing executed by the debtor and attested by witnesses is nugatory unless the debtor or witnesses be living, so of him who enjoys not a pledge, nor makes it his own, nor shows to others that the pledge was actually received, the writing, though complete, is no evidence so far as concerns the pledge. The *Retnácara.*

Even after the death of the witnesses and debtor, if the creditor actually enjoy the pledge, that pledge is valid; how can it be asserted that the writing is nugatory? To this it is answered, some person comes and makes a demand upon another in these words, "thy father is my debtor," inspect this bond; all those "who witnessed it are dead, and thy father also is dead:" as in this case, so, if there be no other proof of a pledge, a mere writing is nugatory, because it is unavailing. That is mentioned by way of example. Or, *it may be thus explained;* if a chattel belonging to some person have been enjoyed for a few days *only* by another, or be contested, and the possessor, sued by the owner before the king, allege, "his father received a loan from me, and the bond is forthcoming;" then, if the witnesses be dead, the writing is nugatory, even though there be actual occupancy. Such being the case, there is no difficulty *in explaining the text* without assuming *the terms of comparison* as and so; for the sense would be, he who does not actually *possess nor* enjoy the pledge may not claim it; and a writing is nugatory when the witnesses and debtor are deceased: and in this case, undisputed possession, and a term *fixed* for the restoration of the pledge, must be understood. It may therefore be affirmed, that when possession has been interrupted, but witnesses are living, the pledge is valid; yet, in the case of uninterrupted possession, the pledge is valid even though the witnesses be dead.

'Nor shows to others, &c.' to others besides those named in the writing, that is, for the purpose of evidence. Consequently the affirmation of it to another should only be made in the presence of the defendant. Or "claim" may signify sue before the king. The writing, though complete is no evidence, even though correctly drawn, in the form already described, with all its conditions, "first inserting the lender's name and so forth." Hence a writing in this or other similar forms, "I borrow one hundred *suvernas* from DÉVADATTA," is certainly unavailing.

"It is no evidence so far as concerns the pledge;" it follows, that the writing may be good evidence so far as concerns the debt. Consequently the sense is this; if there be a writing, payment of the debt proved by that writing shall be enforced; but, without *actual* occupancy, a pledge, though proved by that writing, shall not be obtained. Why does he not actually enjoy or occupy it? Has it been restored on receipt of another pledge, or has it been released on a solemn promise *of payment* or the like? Or the sense may be this; if the loan have been actually received from the creditor by the debtor, for what fault should the creditor lose it? But a pledge long unenjoyed cannot be seized. As a man's own effects, being neglected by him and long possessed by a stranger, become the absolute property of the possessor; surely, if a pledge, which is the property of another, be not possessed by the pledgee, it is the absolute property of the owner who does possess it.

What then is suggested by the word "claim?" for those to whom the claim is shown become witnesses only; but if the thing be unpossessed through neglect, of what use are witnesses? The answer is, he should fully

show, in an assembly of people, the reason why he has not possession. For instance, "executing a mortgage deed to me, he has received a loan, why does he not deliver the pledge?" Such a dispute is supposed. But if a contest do subsist, as possession is not *then* valid *without proof of right*, neither is an unenjoyed pledge valid. This is one case. "This ornament is pledged to me: but his daughter's nuptials will be celebrated two months hence; his wife may wear it for that period, afterwards it must be delivered to me." This is another case. On these and similar occasions, if the recorded witnesses be alive, they can depose these circumstances. There is not consequently any contradiction between the first and last case.

Here the expression "does not enjoy" concerns a pledge for use; "nor possess" concerns a pledge for custody; "nor claim" concerns both.

The *Retnácara*.

But this text does not concern a pledge for custody consisting of ablutions in the Ganges, or other observances producing religious purity; for it is not applicable *to such pledges*.

And this is nearly, *but not strictly true;* for a pledge, whether for use or custody, may be confirmed, although it be not ascertained whether it have been actually possessed or not. The *Retnácara*.

This meaning is intimated; although he have not himself shown his claim to other men, yet if they know *and depose* the whole circumstances, even in that case also the pledge is confirmed.

A text of law, cited in the *Retnácara*, expressly declares the nullity of a pledge in a case of neglect.

127.

Smriti:—A house, *a reservoir of* water, a market place, grain, women, beasts of burden, *and the like*, are destroyed or spoiled by neglect.

"A market place;" a place where commodities are sold.

The *Retnácara*.

"Water," preserved for his own use. "A reservoir of water;" a well or the like. "Beasts of Burden" are expressed in the plural number, to signify "and the like." Consequently a garden, a field, and the like, are comprehended by the text; in short, all *kinds of* pledges are destroyed by neglect. If the pledgee neglect it, a house is destroyed or spoiled for want of thatching; a well or the like, for want of extracting earth by which it is choked; a market, for want of concourse of buyers and sellers through fear of ill-disposed persons; grain, by robbery or the like; cattle, women, and beasts of burden, for want of food or care: so in other instances according to the circumstances of each case.

"They are destroyed," and utterly lost; or they remain, but are spoiled and become unfit for use. By this mention of things destroyed or spoiled, neglect is shown blameable; and it is a fault on the part of the creditor. Consequently, if the pawnor preserve them, they would be possessed by the debtor: but if he do not preserve them, they are lost; and why should another pledge be delivered to the creditor? The debt therefore remains unsecured by a pledge.

CHANDÉSWARA remarks; "*when* mortgaged houses and the rest are destroyed or spoiled by the fault of the pledgee, the mortgage is annulled. It is therefore implied, that another pawn shall not be given by the pawnor in consequence of the pawnee's fault." It is consequently evident, that the same opinion has been entertained by CHANDÉSWARA.

"By the *actual* possession of a pledge, the validity *of the contract* is *maintained*" (96). The sense is, by actual possession only of a pledge is the validity of the contract *maintained;* for the text coincides with those of VYÁSA and VRĬHASPATI. Consequently, if it be neglected, there is no possession of the pledge, as already explained. Hence, if a creditor having lost one pledge demand another; or if he attempt to seize a pledge saved by the debtor, who interfered when loss impended through *the creditor's* neglect; in such cases the creditor shall not obtain the pledge. So much is declared. Yet, if the creditor did not neglect the pledge, but it be spoiled by the act of GOD, another pledge should be delivered. This the Sage declares; "if it be spoiled, though carefully kept, &c.," (96). Spoiled is there illustrative of detriment.

128.

CÁTYÁYANA:—Should a man hypothecate the same thing to two creditors, what must be decided? The first hypothecation shall be established; and the debtor shall be punished as for theft.

"Decided;" ruled. The *Retnácara.*

Consequently the last hypothecation is not valid: and this supposes that both mortgagees have obtained possession; if either or both have not obtained possession, the hypothecation to him who obtains not possession is invalid, as above mentioned. Both may have obtained possession of the same thing: for instance, one has had possession for a few days; afterwards the other, disseising him by force or fraud, possesses the thing a few days. Again; the thing is possessed by one through force or the like, but the other disseises him; in this case, the attempt to take possession on the part of him who disseises the other, is well argued to be *a sufficient act of* occupancy: where neglect is declared a cause of invalidating the mortgage, there, if the claimant, long attempting but not obtaining possession, has been content, it is *considered as* neglect.

"The debtor shall be punished as for theft:" for pledging the same thing to two persons, the pledgor shall be punishsd as for theft. VISHNU expressly declares it.

129.

VISHNU:—He who has mortgaged even a bull's hide of land to one creditor, and, without having redeemed it, mortgages it to another, shall be corporally punished *by whipping or imprisonment;* if the quantity be less, he shall pay a fine of sixteen *suvernas.*

"Even a bull's hide of land;" land to the quantity of a bull's hide. The definition of a bull's hide will be cited further on. If he *twice* mortgage a less quantity than that, he shall be fined in sixteen *suvernas.* On a

cursory view there seems disparity in the punishments, by corporal chastisement, and by a fine of sixteen *suvernas*. This it would be proper to examine under the title of Fines; *it must be here unnoticed*, for what would avail a misplaced discussion vainly swelling the book?

The last hypothecation is invalid, according to MISRA, BHAVADÉVA, and others; herein the *Retnácara*, *Párijáta*, *Smrĭti sára* and other works concur. Punishment only is shown by the text of VISHNU, the invalidity of the last hypothecation is inferred as a consequence. If the last hypothecation were valid, the first would be certainly void; for one contract must avoid: consequently the words "without having redeemed it" are pertinent. The first mortgage therefore, not being redeemed, is valid; and hence it follows, that the last mortgage is void. But some think the validity of the last hypothecation implied in the punishment of the debtor. This and other *deviations* are liable to objection.

The text concerns land alone. BHAVADÉVA.

MISRA and BHAVADÉVA read "land exceeding *the quantity of* a bull's hide only." MISRA remarks, that the sale of it without ownership is prevented. VISHNU explains the quantity of a bull's hide.

130.

VISHNU:—That land, whether little or much, on the produce of which one man can subsist for a year, is called the quantity of a bull's hide.

"Little or much;" if the land be excellent, and very productive, one man may subsist for a year on the produce of a small quantity of land, and the value of that land is great: but if its produce be small, a greater quantity of land is *requisite for* such *maintenance of one man*. Consequently the value of such less quantity of *fertile* land, and greater quantity of land *not fertile*, is the same. They are equal in value, and the punishment should be determined by the value of the land.

131.

Smrĭti, cited in the *Retnácara*:—If two men, to whom the same property has been pledged, enter into a contest, to him who has possessed the land it shall belong if no force were used.

The construction is, "who has possessed the land without using force." The text must be supplied, "that land shall belong to him." The *Retnácara*.

If the same property have been mortgaged to two persons, and the pledge have been given to one before the other, but one has possession and the other has not possession, the pledge belongs to him only who has possession, not to him who has not possession, even though he be the first mortgagee; for a pledge is invalid without possession, as has been already stated. Ultimately, this text bears the same import; but there is no vain repetition, since both texts were not delivered by the same legislator. VRĬHASPATI.

HELÁYUDHA, VÁCHESPATI, BHAVADÉVA and others read, "he who has possessed it shall prevail" *(yasya bhuctirjayastasya)*. That reading is also admitted by CHANDÉSWARA, but he has quoted the other reading *(yasya bhuctirbhuvastasya)*.

If the same property be mortgaged to two persons, and be possessed by both of them, what should be the decision in that case?

132.

VRIHASPATI:—If one field have been mortgaged to two creditors, *so nearly at the same time that no priority can be proved*, it shall belong to that mortgagee by whom it was first possessed *without force*.(48)

"Nearly at the same time," so that it cannot be known which was first and which last.

By both these texts it is declared, that of two mortgages, in which no priority of time can be ascertained, that mortgage is valid under which possession has been *first* obtained without force. The *Retnácara*.

The meaning is this: if the witnesses be living and depose, "through accident the creditor does not enjoy the thing mortgaged to him; there is no neglect on the part of any person, but we do not remember when it was mortgaged to the creditors respectively;" and if the writings have been acci-

(48) There is a great resemblance, as has been already observed, between the decisions of the Hindu Law, and the texts and principles contained in the Roman *Corpus Juris Civilis*. In some cases, such similarity may be accounted for by historical reasons and hypotheses; but in others, as between the Hindu and JUSTINIAN'S Code, this resemblance may be said to arise principally from a uniformity in the construction and operations of the human mind, which, no doubt, makes the reasoning of different men come to the same conclusion upon a common topic. BOWYER, *Com: Un: Pub: Law:* p. 146. Thus, in the matter of preference of hypothecary creditors one to the other by reason of priority of their respective securities, the rule laid down by CÁTYÁYANA (*supra* 128) is in accordance with the principle of the Civil Law; which declares *Qui prior est tempore potior est jure*;—(D. 41, 1, 3.) The reason of that rule is, that the debtor who has hypothecated his property has thereby diminished his right over it, and therefore cannot convey to any one any right over the property, except subject to such diminution; for, agreeably to the maxim *Nemo plus juris ad alium transferre potest quam ipse habet*. (D. 50, 17, 54.)

With respect to the preferential title as regards two mortgagees of the same field, the decision of VRIHASPATI (verse 132) in favor of the one, who is in actual possession is, likewise, in accordance with the principle of the Civil Law,—namely, *Uti possidetis,—possessor potior est*, (*L.* 15 *Cod: de rei Vind. l.* 72, *&c.*)

The principles of Hindu law above described may be best illustrated by the cases given below.

In *Tooljeram Atmaram* v. *Mean Moohummud and another* (2 BORR., 130), where land was doubly mortgaged, in the first instance to A, and again to B, under two bonds at different times, the second with a condition of sale after five months without redemption, and possession vesting in B; it was held by the Court of Sadr Adalut, Bombay, under the authority both of the Hindu and Mohammedan Law, that a mortgage is completed by possession; and that a mortgage of a later date, supported by occupation, annulled a prior one unaccompanied by possession. Similarly, in *Kundoojee Bin Hybutrao* v. *Ballajee Denanath* (BELLASIS, 5), it was held by the same Court, that whenever the same property had been mortgaged to two distinct parties, the one in possession of the property by the Hindu Law was entitled to a preference in supercession of any priority of mortgage to the other. These cases illustrate the position *Possessor potior est*.

In *Magun Doss* v. *Mudunmohan* (2 MACN., *H. L.*, p. 303) the Hindu Law officers declared that if a person having sold his lands to one individual, sell the same property to another person, the first purchaser is entitled to the property;—thereby supporting the principle, *Prior in tempore potior in jure*.

In reference to the foregoing propositions may be noticed the text of YÁJNYAWALCYA (cited *post* Book II, Ch. II, Sect. I, v. 28), to the effect:—"In all other contested matters, the latest act shall prevail; but in the case of a pledge, a gift or a sale, the prior contract has the greatest force." The meaning of this text seems to be, as Mr. MACNAGHTEN has rightly remarked, that where a person mortgages his property for a valuable consideration to one person, and again mortgages the same property to another, the first mortgage shall hold good; but in case where a man mortgages his property, and subsequently makes a sale of the same property, the latest contract will have superior force, on the satisfaction of the debt for which the property was mortgaged; in other words, that a prior *pledge* shall avoid a subsequent *pledge*, but it shall not avoid a subsequent *gift* or subsequent *sale*.

As regards the English law on this subject consult Fisher On Mortgage; Chapter VII Of Priority.—EDITOR.

dentally lost, this text governs the decision of such a doubtful case. Again; a tree has been pledged with its fruit at the same time *to two creditors* by some man *in person* or through his son, and debts have been contracted with two persons; one of those creditors has enjoyed the produce of the tree, but the other has delayed occupancy to display his own generosity, and the parties are not aware of each other's loan and occupancy; in such a case also, the mortgage is valid in favour of him who first obtained possession. In this case there is no question on the priority of hypothecation; but if the witnesses prove that it was first pledged to one creditor, though last possessed by him, and there has been no neglect on the part of any one, that pledge belongs to him to whom it was first hypothecated. This, however, is not the purport of the present text. Should a thing be first mortgaged to one creditor but neglected by him, and be afterwards mortgaged to another creditor and possessed by him, and the first creditor claim possession at a subsequent time, in that case the pledge belongs to him by whom it was first possessed, though he be the last creditor. This and other points may be reasoned.

If the priority both of mortgage and possession be doubtful, a text cited in the *Retnácara* and *Viváda Chintámeni* directs the decision of the case.

133.

Smrĭti:—By two creditors claiming the pledge *on the grounds of possession* for an equal time, it shall be shared equally; and the same rule is declared in the cases of a gift and a sale.

The pledge shall be equally taken, that is, in equal shares, by both mortgagees; and their shares shall be proportioned to the amount of their respective loans. For example: the first debt amounts to a hundred *suvernas*, the other debt to fifty *suvernas*, and the mortgage consists of one village; in that case, since partition must be made between the two creditors, therefore dividing the land *or rent* of the village in equal portions with the debts due to those creditors, shares should be given to each in proportion to their respective debts: and this supposes debts of the same nature; but if they be of various natures, the amount must be computed from the value which the things bore at the time when the debts were contracted.

In the *Viváda Chintámeni* the text is read, "if both have possessed it quietly for an equal time, it shall remain in their joint possession." BHAVADÉVA concurs in this reading.

And this is nearly *but not strictly positive*. When seen proof, *or evidence*, in favour of both parties is equal, a decision may be grounded on unseen proof, *or mental conviction*. MISRA.

If the seen proof, that is wordly or popular proof, such as possession or the like, by which, in a case of dispute, the matter might be determined in favour of one party, be equal, a decision may be grounded on unseen argument, or *due* consideration *of the credibility of the evidence*. When therefore the priority of the mortgage and possession is doubtful, a decision should be formed on consideration *of circumstances*. If the rights of both be on any account undistinguishable, equal shares should be assigned: and this is almost expressly declared. Such is MISRA's meaning. BHAVADÉVA concurs in that opinion: and it is reasonable; for suits should be

decided by the king with due consideration of the course of things. But that is a remote affair, which cannot be ascertained by the king; Sages have therefore delivered a rule of decision. Yet, if any one can ascertain the matter through investigation guided by profound justice, why should recourse be had to equal participation or the like?

"In the case of a gift;" if one thing be given to two persons, the same rule of decision, according to actual possession, is declared in that case also by a text which will be quoted ("*even* in immoveable property a title is gained by *long* possession, and lost by *silent* neglect).* The same decision should also be given in the case of a sale; for there is no difference in the devesture of property by gift or sale. But when the same thing has been sold to two persons, and priority of time being proved, one of them is entitled to the thing, and the other not entitled to it; he who does not obtain the commodity sold, shall recover the price from the seller: if both are entitled to receive shares of the commodity sold, half the price paid by him and half the commodity shall be the share of one, and the other half of the commodity with half the price shall be the share of the other. This shall be considered as the rule of decision.

If both equally have, or have not, possessed the thing, and there have been no neglect on either part, and the priority of mortgage be doubtful, a text of law, cited in the *Retnácara*, propounds a decision on the disparity of written and verbal evidence.

134.

Smrĭti† :—If a pledge, a sale, or a gift of the same thing be *alleged to be* made before witnesses *to one man*, and by a written instrument to *another*, the writing shall prevail *over the oral testimony*, because one contract only is maintained.

If one contract be attested by witnesses, and the other be authenticated by an attested writing, the attested writing shall prevail; that is, it shall establish the mortgage. "Because one contract only is maintained;" because the contract with one man only is maintained by the writing produced. The *Retnácara*.

Consequently the joint evidence of a writing and witnesses is exclusive, and verbal evidence singly must be excluded, because one contract only is maintained in consequence of the writing produced. A pledge has been given before witnesses to one man, and with a written instrument to another, but both have possessed the thing; after a few days a contest arising thereon, the pledge authenticated by a writing is alone valid. The text (134) is considered in the *Retnácara* as conveying that sense. Again; the owner has delivered a pledge to one man with an instrument in his own hand-writing, unattested, but not extorted by force, and to another before witnesses; even there also the writing shall prevail. The reason of it is, that the depositions of witnesses may possibly be false.

But HELÁYUDHA says, if there be no occupancy, but a writing exist duly attested and so forth, the writing shall prevail, because it is the best evidence of a transaction; it shall establish the mortgage. It is hereby intimated, that, if there be written and verbal evidence, a mortgage is not

* Attributed to VRĬHASPATI. See Book V, v. 384.

† Attributed to VRĬHASPATI.

of course invalid for want of occupancy. That opinion is not admitted in the *Retnácara*, for it is incompatible with the text of VRĬHASPATI (126). Yet, in fact, this text is an answer to him who should affirm, on a hasty consideration of the text of VRĬHASPATI, that a pledge is invalid for want of possession, in a case where the thing has not been possessed, but where no neglect is imputable to the pledgee. For instance, where a pledge or other contract has been made by an attested written instrument, the writing shall prevail; that is, it shall establish the mortgage. Such is HELÁYUDHA's meaning, and that should be considered as admitted in the *Retnácara*, as has been already stated more than once.

A pledge is only lost under the text, "a house and the rest are destroyed by neglect, &c.," (127). Forfeiture of property by silent neglect occurs in cases of gift and the like. So in the present case also, the pledgee is prevented from obtaining possession in consequence only of his silent neglect. Else, we think, a gift made for the benefit of the donee under the text concerning gifts, "in his mind intending the donee, let him cast water on the ground;" would be void, if the donee, through ignorance, did not immediately take possession.

This must be understood of two contracts of the same nature. But for contracts of various natures opposed *to each other*, the rule of decision will be delivered under the title of Relative Force of Contracts.

If neither party have decisive possession, and no neglect be imputable to either party, but both have writings, and those writings be attested, the following texts of law, cited in the *Retnácara*, propound a special decision.

135.

*Smrĭti** :—But if a man first mortgage land without noticing all *circumstances*, and afterwards mortgage it with express description by name *and the like*, that writing which contains an express distinction shall prevail.

2. If a field, or a house, be described in a written instrument by its limits, and if villages and the like be *so* described, the contract is valid.

3. When a distinction is expressed in a writing to one man, and no distinction to another, the express distinction, says CÁTYÁYANA, shall preponderate.

In the first text it is ordained, that, if a writing be delivered to the first creditor in this form, "I mortgage so much land to thee, and receive a loan of a hundred *suvernas*;" and if it be mortgaged to the last creditor by a writing in the form directed by YÁJNYAWALCYA as abovementioned, inserting the name of the lender and of the borrower, and so forth; then the mortgage is valid in favor of the last creditor.

The sense of the second text is this: if a written instrument, specifying the limits, be delivered to one man in this form, "this field measured by four hundred cubits, and extending east and west from such a pond to such a mango tree, and north and south from the land of such a person to such

* Attributed to CÁTYÁYANA.

a river, is mortgaged to you;" and if it be mortgaged to another by a writing in this form, "this field is mortgaged to you;" the field conveyed by the instrument which specifies the limits acquires validity, that is, it becomes a valid pledge: and so of a house, a village, or the like. Or "villages and the like" may be thus expounded: the creditor's village; the village in which the creditor resides, occupying a dwelling house, land, and the like: that in which the debtor resides; and that in which the field is situated: if those villages be described. Under the words "and the like" are comprehended the names of fathers and so forth as directed by YÁJNYAWALCYA, and all other particulars of places and the like as required by local usage.

By the third text this meaning is denoted: to one man the mortgager delivers a written instrument in this form, "the land situated in such "a village, extending from such a boundary to such a boundary, and belong-"ing to me YAJNYADATTA, is mortgaged to the DÉVADATTA;" to another he mortgages land in another form, "this is addressed to CHAITRA; the field "belonging to me YAJNYADATTA, situated in such a village, extending from "such a boundary to such a boundary, and which was obtained by favour "of the king, in consequence of great services rendered to him, is mortgaged "to thee;" a distinction being thus expressed, that is, the land being thus particularly described, the writing which contains an express distinction, specifying the land obtained by favour of the king, shall preponderate; resisting the other mortgage, it shall maintain the mortgage it conveys. Or the third text may be considered as intended to enforce the sense of the former texts.

From the expression "preponderate" it follows, that the other is not preferable. Consequently, when there is no contradiction, but one instrument only expresses the name, boundaries and other distinctions, the *other* instrument is sufficient evidence, if the limits and other particulars can be ascertained in any other mode. This is also admitted by CHANDÉSWARA, for he delivers this gloss, "under these texts, if the mortgage be made to one man in a general form, and the same thing described by name be mortgaged to another; then, if the contracts be incompatible, that which expresses a name and other distinctions shall prevail." If such were not his meaning, he would not have added "if the contracts be incompatible;" he would have only said, the mortgage not described by name and other distinctions shall not prevail. This we hold reasonable.

Occupancy prevails over verbal and written evidence; but, if possession be equal, the decision must be argued from the disparity of the writings. If these also be equal, participation is reasonable. No one has directed a decision on the disparity of verbal evidence. In support of these opinions, it is proper to adduce the text above cited (133).

All this is enjoined, *but not inflexibly*. Through ignorance or the like, the writing has been delivered to the first creditor in some *irregular* form, and he has not silently neglected the pledge; if all the circumstances be fully ascertained by the king or arbitrators from the evidence of neighbours, and if a writing in due form agreeable to law and usage were delivered to the last creditor, still it is argued by such men as we are, that the hypothecation to the first creditor is valid; for these texts of Sages are rules of civil law. Accordingly, after citing the text (133), MISRA adds, this is enjoined, *but admits exceptions*.

If a mortgage deed, *irregularly* drawn by a person inexperienced in such affairs, should happen not to be otherwise proved authentick, the mortgage deed in favour of a crafty person might prevail; would not failure of justice be therefore imputable to the king for an untrue decision, *though* grounded on a legal rule? None could be imputed; such a decision is the consequence of particular circumstances. When the day, lunar asterism, and sign, in which a man was born, are unknown to astrologers, as the purpose is accomplished by assuming the sign from the first syllable of his familiar appellation; (for instance, 'A and LÁ *suggest* the constellation of the Ram; and so forth* :) so there is no failure of justice in *resorting* to this *expedient in a doubtful case*. However, after much investigation, throwing the load on the supreme ruler, a decision should be made with due consideration of the *general* conduct of both parties. Accordingly *the author of* the *Retnácara*, citing the following text (136), and expounding it, "if a man, mentally intending a particular thing, pledge his property not exhibited, nor precisely described, and consequently as imperceptible as the subtile element, it shall not be considered as a definite pledge;" adds, this is made evident by the subsequent text (137): and if indefinite hypothecation be practised in certain instances, possession may be granted by a special rule without *valid* hypothecation.

136.

Uncertain:—If a man pledge his property unexhibited, and undescribed as to its nature, and consequently imperceptible like the subtile element, that shall not be considered as a definite pledge.

137.

Uncertain:—Whatever then belonged to that *debtor*, the creditor may suppose described *by the contract*.

Some explain the term, 'unknown,' *instead of* "*unexhibited*," justifying the interpretation from the sense of the verb *vid*, know: that thing, which, being undescribed as to its nature, is not known or ascertained. It is not certainly described by its limits, the village in which it is situated, and other distinctions; it is therefore similar to the subtile element, equally invisible and imperceptible; and consequently shall not be considered as *sufficiently* definite. *For example;* "a field measured by a hundred cubits is mortgaged to CHAITRA;" it is not thereby particularly known where and of what description that field is. How should a man so mortgage land? The commentator explains it; "mentally intending *a particular field;* indicating it by a general description, but not actually showing it. "Whatever then belonged to him" (137); whatever belonged to the debtor at the time of making the hypothecation, might, through excess of confidence, or unguarded ignorance, be supposed by the creditor *pledged to him*. Whatever the creditor therefore occupied as the intended pledge, would be merely held under the authority of practice, to maintain the agreement inviolate. They thus expound the gloss of the *Retnácara*, "If indefinite hypothecation, &c."

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* In drawing the horoscope of an infant, the lunar asterism under which he was born guides the selection of his name; for instance, if he was born under *Aswini*, a name is selected beginning with CHA, CHÉ, CHÓ, or LÁ. But in drawing the horoscope of a man, whose birth-day is unascertained, the name suggests the constellation.

138.

*Smrĭti,** cited in the *Retnácara*:—Should the creditor, against or even without the assent of his debtor, possess himself or more *land or other* property than was expressly mortgaged, he shall pay the first amercement, and the debtor shall receive back his whole pledge.

When a field measured by four hundred cubits has been mortgaged, should the creditor annex to it another adjoining field, and forcibly possess himself of it, that creditor shall pay the first amercement, namely, the amercement first directed, which MENU thus propounds, "Now two hundred and fifty *panas* are declared to be the first *or lowest* amercement." To explain the sense of the text, this observation is made respecting fines. CHANDÉSWARA thus comments on the text; "if the creditor forcibly annex to the pledge more land or other property than was expressly mortgaged, and possess himself of it, he shall be fined, and the mortgager shall receive back the land or other property mortgaged, without paying the sum due."

Consequently the debt, though lent by the party himself, is forfeited by reason of an offence consisting in encroachment on land exceeding the mortgage. But the debtor shall not receive the value of what has been previously obtained by enjoyment, since no text ordains it. Yet, if the debt be not discharged from the use of more land than was mortgaged, the mortgager shall *nevertheless* recover his pledge without discharging the debt; else the terms of the text, "the debtor shall receive back his whole pledge," would be unmeaning.

Here it should be remarked, that if a loan be obtained on this condition, proposed by the borrower to the lender, "be this field pledged to thee; the pledge shall be redeemed after four years, on the seventh day of the month of *Bhádra*: if I do not then redeem it, the pledge shall become thy absolute property;" the mortgage is not usually foreclosed, even though the debtor fail in his agreement. If a covetous creditor, reflecting on this local usage, say, "give a bill of sale;" and a necessitous borrower, to obtain the loan, execute a bill of sale, but insert as a date the future month and year intended by him, and specify in writing that the price received shall bear interest to that time; and if the debtor occupy the land until the stipulated period expire; is a contract in this form a mortgage or not? It is answered, since a bill of sale is executed, it is a sale and not a mortgage. Does the sale take place immediately, or on the future day specified in the writing? Not immediately: for, if the sale took place immediately, the debtor could not repay the price borrowed, and recover his pledge on a subsequent day. Nor can that be deemed admissible; for it would be inconsistent with practice. Neither is the second supposition true; for, since the vender does not intend an immediate sale, his property is not devested. Nor should it be affirmed, that the vender must intend a sale on the day when the writing is executed; for the borrower cannot be supposed to consent to a sale inconsistent with his purpose. On this point it is said, the sale is concluded on that very day when the vender receives the price; but property is not immediately devested. Yet the period, contemplated in the

* Attributed to CÁTYÁYANA.

vender's actual intention at the time of the contract, devests the property of the original owner. Or the promise of a future sale is clearly conveyed by the writing then executed; and the borrower, consequently bound by his agreement, must consent to the sale; else he would be punished, and held guilty of a moral offence. Therefore do good men execute such bills of sale.

On this a question arises: if the contract were executed when four thousand years of the *Cali*-age were expired, and dated in the four thousand and fifth year; should the borrower or witnesses die in the interval, the writing being insufficient evidence, the money lent might be irrecoverable; and how could a mortgage of the land be alleged? That should not therefore be practised. Yet, in fact, since many excellent persons do so proceed, arbitrators by some means admit the writing, because such current practice is remarked. But, if the writing be fully proved, it is a valid bill of sale. Should the borrower or his son be unable to discharge the debt in the interval, the sale must be acknowledged by the son, because it was promised by his father. Else he would be guilty of a great offence in violating his father's engagement: and the king should animadvert on it. But, if he can discharge the debt within the period, the sale is not valid; for the borrower then assented to the devesture of property, concomitant with failure in payment of the debt.

If a borrower execute a mortgage deed for a limited time, and also a bill of sale dated on a future day, there would be no difficulty in recovering the money lent. This is remarked on the prescriptive usage of good men; but it has not been expressly noticed by any author. On the contrary, if a pledge be given upon this condition, "should the debt be undischarged on a certain day, this pledge shall become thy absolute property," then, if the pledge be not redeemed, that pledge shall belong to the creditor as has been more than once declared, and that alone is suggested by the texts of Sages.

It may be here remarked, that when a loan is made on a pledge received, the pledgee should deliver a written acknowledgment to the debtor; else the creditor, enjoying the pledge, might affirm, after a considerable lapse of time, "this has been possessed by me twenty years, and is solely mine." As a written contract relative to tillage is both given and received by the cultivator and landlord, *so should mutual agreements be delivered in this case also.* Accordingly "mutual" is specified in the text of VRĬHASPATI (12).*

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* The Compiler takes occasion to relate an ancient tale. A borrower, pledging a valuable vessel through the medium of his own servant, and executing a written instrument, contracted a debt. Afterwards, the servant being dead, the creditor told the debtor, who offered to redeem the pledge, "the pledge has been already redeemed by thy servant." In this contest the debtor was cast by many arbitrators. He afterwards truly represented the whole circumstances to a certain king, and that king understanding the case, called the creditor, and having listened to his narration, showed him great courtesy. The king, having assumed the character of a friend, took the man's ring under pretence of viewing it; at that moment a servant of the king, previously instructed, announced to him that his mother called. Seemingly interrupted thereby, he retired to an inner apartment, taking the ring with him as it were by mistake. Thence he sent a servant with the ring to the creditor's steward: "Unless the vessel be instantly produced, thy master's life is forfeited, this ring is my token;" hearing this, the steward delivered the vessel to the messenger. Having received the vessel in the inner apartment, the king put betel in it, and called the debtor. He, attending and seeing the vessel, with down-cast look said, "I have offended, my servant must have been dishonest; without my knowledge he has sold this vessel; else how could it be in thy possession?" The king, having ascertained the weight and value of the vessel by means of artists, imposed a fine on the creditor, delivered the pledge to the debtor, and directed payment of the debt to the creditor. If there had been a writing, adds the compiler, no such dispute could have existed.

On the subject of pledges something remains to be said.* In fact a pledge delivered for use is a pledge to be used, and a pledge delivered for confidence only is a pledge for custody. The text of MENU (v. 91) concerns a pledge for use; his text (v. 88) must relate to a pledge for custody, since it expresses "without the consent of the owners;" his text (v. 87) regards a pledge for custody. Consequently, since the use and profit of the pledge is the only interest in the case of a pledge to be used, interest at the rate of an eightieth part is prohibited. Should a pledge for custody be used, the use of it not being forbidden by the owner, half the interest is forfeited; but if the use of it were forbidden, the whole interest shall be forfeited. The same meaning should be also attributed to the text of YÁJNYWALCYA (84): if a pledge for custody be used, the forfeiture of interest is equitable, since *the use of it* had not been allowed in place of interest; but if a beneficial pledge be used, there shall be no interest, that is, no interest at the rate of an eightieth part and the like. Since the single word "interest" may be connected with both phrases (84), there is no objection to the admission of both meanings. Such is the opinion of CULLÚCABHATTA.

That chattel, from the use of which no loss arises, is a pledge which may be used; that is, one, the use of which causes no ill: for participles of this form signify what may be done without causing any ill; as in the example, "a priest and a king are never to be slighted." Any other pledge is a pledge to be kept, that is one which must be kept or preserved. Hence SÚLAPÁNI'S gloss delivered in the *Dípacalicá* (where a pledge for custody is explained a pledge to be kept, such as clothes, ornaments or the like; and a beneficial pledge is exemplified by an ox or the like;) is fully justified: and the remark of CHANDÉSWARA, in his gloss on the rule of VISHNU (82), which restricts the word "pledge" to a pledge for custody only, is pertinent: else, since MENU (91) also declares, that there shall be no *other* interest when a beneficial pledge is used, the restriction of the term to a pledge for custody, as inferred by CHANDÉSWARA, would be irrelevant. Thus likewise the gloss of MISRA on the text of CÁTYÁYANA (89) is fully justified, where, after observing, that in every case where the pledge is used against the will of the owner, the whole interest is forfeited; and when a slave or the like, being pledged, is employed, half the interest, he adds, but if a pledge for custody be used, the whole interest shall be forfeited. Else, since it is reasonable that all *other* interest should be foregone, when a pledged slave or the like has been delivered for use, the forfeiture of half the interest would be irrelevant. But if such a slave or the like be delivered for confidence only, the pledge is for custody; and if used, the whole interest shall be forfeited: and hence that explicit statement of the distinction arising from this text was proper.

This opinion of some lawyers appears correct: a debtor, borrowing five pieces of money, has pledged a copper caldron worth ten pieces; the creditor uses it without, though not against, the assent of the owner, during five years from that date; and the vessel is not thereby totally spoiled, but, being much worn, is reduced to half or a less portion of its original value: in such a case the forfeiture of half the interest *only* would be inconsistent with common sense. The law has been thus explained at large.

* In the original, these remarks are subjoined to the last chapter on the Recovery of Debts.

But others expound the phrase, "on its loss or destruction," which occurs in the text of NÁREDA (81, 3), 'should the lender neglect the preservation of the pledge:' consequently, should the care of the pledge be neglected by the creditor, and the pledge nevertheless be fortunately uninjured, still the interest is forfeited. For example; a cow is pledged to a *Yavana* by a foolish debtor, and that ill disposed creditor of the *Yavana* race neither uses the cow, nor feeds her at his own house; but that cow grazes night and day in the forest, and, being destined to a long life, survives; not being bitten by a snake or the like, or being bitten but cured by some traveller: in such a case, *the interest is forfeited.*

VIJNYÁNÉSWARA considers the text of MENU (v. 91) as relating to a pledge delivered for use; and the text of YÁJNYAWALCYA (84), and another text of MENU (v. 88), as relating to a pledge not delivered for use. But if a pledge delivered for use be damaged, interest shall be forfeited, under the precept of YÁJNYAWALCYA, "nor *any interest,* if a pledge for use be damaged" (84). "A pledge spoiled shall be made good;" if a pledge not delivered for use be damaged in a small degree or the like, it must be repaired, and thus restored in its former condition; should it have been used, interest shall be forfeited. If a pledge delivered for use be damaged in a small degree or the like, it must be repaired, and restored in its former condition; if it bore interest, that interest shall be forfeited. Should a pledge be utterly spoiled or destroyed, an equivalent must be given, or the price of the pledge must be paid, or the principal sum shall be forfeited.

CHAP. IV.

ON

SURETIES.

139.

CÁTYÁYANA:—Neither the master *of the lender*, nor his professed enemy, nor an agent of his master, nor a prisoner, nor a criminal amerced, nor one whose character is ambiguous.

2. Nor a coheir or joint-tenant *with either party*, nor an intimate friend, nor a pupil, nor a servant of the king, nor a religious anchoret.

3. Nor a man *reputed* unable to pay the sum to the creditor, or a fine of equal amount to the king, nor one whose father is living, nor one who is guided solely by his own froward will.

4. Nor a man who is not well known, should ever be accepted as a surety for any purpose.(49)

A man confined by the king for some offence, becoming surety for another, might *afterwards* plead, "how can I enforce payment of the debt?" Or, *it may be objected*, how could he attend to that matter when contested? A prisoner therefore should not be accepted as a surety. "A criminal amerced;" that is, one on whom punishment impends: else, since almost every person may casually become liable to punishment, none could be accepted as sureties: but this criminal is refused because the fine impoverishes him, and he is therefore unable to make good the debt. Thus some interpret the text; but that is wrong, for the same sense is also conveyed by the words "a man unable to pay the sum to the creditor." Some again hold, that a criminal amerced is refused as a surety, through apprehension

(49) In the above text KÁTYÁYANA exonerates a variety of persons, who, it is declared, should never be accepted as sureties. These exceptions involve, as observed by SIR THOMAS STRANGE, (H. L., vol. I, p. 300) either some inconsistency with prior engagements, or some incompatibility with subsisting connexions;—if not an evident risk of the object failing, from the character, or description of the person produced, in the event of his being selected, as the intended surety. In a system, however, like that of the Hindus, not restricted to positive ordinance, they may be considered perhaps; for the most part, as affording matter of prudential caution, rather than of legal disqualification; though the rejection of one undivided brother, as a surety for another, respecting a common interest, would indeed be consonant to the strictest law.—EDITOR.

of his sinful misconduct. But, in fact, future impoverishment is suggested by the term explained "a criminal liable to amercement;" since he is not at present reduced to indigence, there is no vain repetition.

"One whose character is ambiguous;" so explained in the *Retnácara:* that is, a man of ambiguous character. That gloss intends one whom honest men suspect to be ill disposed. If his evil disposition be ascertained, surely *he cannot be accepted as a sponsor.* Others expound the term, 'accused:' they suppose one whom any person arraigns in a public assembly, alleging that he is addicted to the use of intoxicating liquors.

"A coheir;" a joint-tenant with the creditor or debtor.

The *Retnácara.*

The notion is this; if the creditor accept his own coparcener as a surety, does he not make himself surety? If he accept the debtor's coparcener as a surety, does he not make the debtor surety for himself? A text of YÁJNYÁWALCYA to the same purport will be cited. "A friend" of the creditor *must not be accepted,* lest friendship be violated.

"Pupils," *literally* apprentices; disciples. The *Retnácara.*

The reason is, lest affection be diverted. But the author of the *Mitácshará* reads *atyantavásinah* instead of *anténivásinah,* and expounds it 'perpetual students in theology.'

"A servant of the king;" one employed by the king, his minister, and the rest. On the reading, "nor the king, nor one employed in his affairs," king is illustrative of a general sense: it would be superfluous for the king or his minister to become a surety; because the king, by *the* nature *of his trust* is *an universal* surety; and his deputed minister or other officer is certainly so likewise; and a servant of the king's should not be accepted as surety, lest he avail himself of his superior power. "Religious anchorets" should not be accepted as sureties, because they are venerable, and are not capable of civil transactions. The want of independent property is the objection against one whose father is living.

"One who is guided by his own will;" who is solely guided by his own froward will, and not by any consideration of circumstances: consequently his incapacity for civil affairs is the objection against him.

"A man *reputed* unable to pay the sum to the creditor;" if he be unable to pay the sum to the creditor, for what purpose should he be accepted as a surety? "Or a fine of equal amount to the king;" if the creditor accept as a surety a man able to pay the sum to him, but unable *also* to pay a fine to the king; then, should he become liable for a fine to the king in consequence of some offence, and be therefore unable to pay both sums, the creditor could not recover the whole sum from him: for this reason he should be refused. Thus some expound the text; but in fact this text is not restricted to loans, for it expresses generally "for any purpose." Consequently, when a surety is required by the king, he should not accept one who is unable to pay a fine: and that is merely illustrative; a man unable to produce the party, should not be accepted as surety for appearance and so forth. If a creditor accept as a surety "one who is not well known," then, after a lapse of a few days, when he has gone to another place, and the debtor has absconded, from whom could the creditor recover the sum? The creditor should therefore accept, as a surety, none but a man who is well known.

He who becomes a substitute for another (*pratibhavati*), is a surety (*pratibhú*) or bondsman. By parity of reasoning, similar sureties should be required in other cases. Consequently, from the full sense of the law, he only should be accepted as a surety *for any purpose*, from whose suretiship no breach of respect, natural affection, or tender regard, need be apprehended; and from whom, or from the debtor, the sum may be subsequently recovered.

140.

YÁJNYAWALCYA:—It is declared, that brethren, husband and wife, father and son, cannot become sureties for each other before partition, nor reciprocally lend *their joint property*, nor give evidence for each other *in matters relating to the common stock*.(50)

Brothers and the rest cannot, before partition, become bound to, or for each other, and so forth. Before partition, a man should not make a loan, taking as a surety his own brother, or the brother of the debtor: nor should he make a loan to his own undivided brother; for all that belongs to him belongs to his brother: how then can it be a debt? It will be declared, that his brother has no title to what is acquired by the man himself: may not therefore his own acquired wealth be lent to his brother? *The answer is*, why should his brother borrow money from him, since his food and other wants may be supplied from the joint estate? If he need it for religious occasions, why should he not use the joint property? *If he wish to adventure it* for increase of wealth, why should he not improve the joint estate? If he require it for the enjoyment of wreaths, sanders wood, fine cloth, and the like, that may be supplied out of joint property; for the law has not forbidden any use of common property.

But if any one resolve in his own mind, "I will perform a religious act on my own separate funds, and I alone shall obtain the benefit of it;" or if his brother forbid such expenditure of the paternal wealth; in such cases, a man intending to dig a pond, or to perform a solemn sacrifice, or the like, out of property acquired by himself, but *finding* some part of his own several property unavailable, may borrow from his brother money acquired by *that brother* himself: why is a loan forbidden before partition? It should not be objected, that a religious act, even though performed by one brother on funds acquired by himself, is the act of both undivided brothers, under a text which will be quoted (Book V, v. 388); and therefore money received for that purpose from a brother, even though it were acquired by himself, is no debt, and shall not therefore be repaid. Another text* declares the participation of all brethren in that religious act only which is performed, with the assent of all, on funds common to all; and the former text has virtually the same import. That a debt may be contracted with an undivided brother, cannot therefore be disputed.

(50) In *Jhyutee Ram Misser* v. *Rajah Mhypal Sing* (2 S. D. A. Rep., 316) a security bond, executed by one member of a joint undivided Hindu family, was held to be binding on the other members of the same family, it appearing to the Court that the separation pleaded in bar to the claim was not established, and moreover deeming it to have been fraudulently alleged in order to evade payment of the debt. 1 MOR: Digest, Tit: Surety, case, 1 *a*.—EDITOR.

* A text of MARICHI is incorrectly cited in this place. After consulting the *Dwaita parisishta* of CESAVA MISRA, and *Suddhi viveca* of RUDRADHARA, I thus translate the text with the preceding verse: "The father being dead, his obsequies must be carefully performed by his son; but if there be many sons of the father residing in the same place, what is done by the eldest alone, with the assent of all, and out of the common stock, shall be *considered as* the act of all."

Again: a man reflecting, "if I obtain profit on joint property, another brother will also have a title to that profit," only lends at interest his own property acquired by himself, or he conducts commerce on that capital; in such a case, a small part of his several property being then unavailable, he borrows from his undivided brother money acquired by that brother himself: here, also, what should prevent him? So if another brother tell one who dissipates the joint property for the enjoyment of wreaths, sanders wood, fine cloth, and the like, "gratify thy wish for enjoyment in proportion only to *thy share of* the wealth," and if he, being thereby restrained, supplies his enjoyments out of wealth acquired by himself; but, some part of his several property being then unavailable, borrows from an undivided brother money acquired by that brother himself: here, again, what is there incongruous? Consequently a debt contracted with an undivided brother for the three purposes of spiritual benefit, of wealth, and of gratification, is in reason valid.

Yet YÁJNYAWALCYA forbids it. Can such a rule be demonstratively true, that, under the text of YÁJNYAWALCYA, a debt may not be contracted with an undivided brother, though in reason such a debt be valid? There is no objection to explain "while undivided," while the property *lent* is undivided: for the sense *must be this;* paternal wealth and the like, and what has been gained by a common exertion, may not be borrowed from undivided brethren.

So, if a religious act or the like be undertaken on a man's own several property, and if a small sum be deficient, and a debt be therefore contracted with another person, an undivided brother may be his surety or his witness: but if he contract a debt for the maintenance of the united family, an undivided brother can neither be surety nor witness; for he also is liable to the payment of the debt: and if this text be adduced by authors to guide the decision when a doubt arises whether a partition have been made, still that supposes either paternal wealth of property acquired in common. This will be discussed in the *fifth* book, On INHERITANCE, under the head of Ascertainment of Partition: and this text has the same import with that of CÁTYÁYANA (139, 2.) "Nor a coheir or joint tenant," as has been already noticed.

There can be no partition between husband and wife (Book V, v. 89.) The text of YÁJNYAWALCYA (Book V, v. 83) intends only a provision for subsistence, not partition: were there partition, wives would become independent, and it would contradict the text of ÁPASTAMBA (Book V, v. 89). Property therefore being common to husband and wife (Book V, v. 415), suretiship and the rest are forbidden, so far as concerns the general estate of the husband; but a contract of debt or suretiship may exist in respect of other wealth, such as the several property of a woman: for example, the husband may borrow from his wife her own several property. So if the wife desire to support her own brother or other kinsman out of her several property, and no part of that property be then available, a debt must be contracted; when that debt is therefore contracted with another person, her husband may become either surety or witness: for YÁJNYAWALCYA (207) denies the absolute necessity of a husband paying such a debt. By the husband only, can no loan be made to his wife; for the text above cited (Book V, v. 415) declares the wife's property in the husband's wealth only. Such is the interpretation according to ancient authors.

But VÁCHESPATI BHATTÁCHÁRYA does not acknowledge the property of the wife in her husband's wealth. There is not, in his opinion, any objection to a gift made by her; however, he considers the husband and wife as never undivided in *respect of* property. This may be admitted; but the author of the *Mitácshará* admits partition between husband and wife, and acknowledges the wife's property in her husband's whole estate; for, in his gloss on the text of ÁPASTAMBA above cited (Book V, v. 89) he says, "since MENU and the rest do not deem it a theft if she use her husband's property in the entertainment of guests and eleemosynary gifts, therefore the wife also has ownership of her husband's wealth: else it would be a theft." A partition may therefore be made at the option of the husband, but not at the option of the wife; as will be mentioned (Book V, Chap. ii). The wife's property in her husband's estate is thus shown (Book V, v. 83); partition *in general* is not again denied: and the text, which does deny partition, is expounded as relating to acts which concern the nuptial fire and the like. But RAGHUNANDANA says, "The legislator mentions partition between husband and wife, intending the assignment of an equal share with the sons, by way of provision for the wife's maintenance: if that have not been done, testimony for each other and so forth is forbidden."

141.

NÁREDA:—After partition, but not before it, brothers may become witnesses or sureties for each other, and may reciprocally give and receive *presents, or make contracts with each other: but in regard to property separately acquired, they may do so even before partition.**

They may give and receive loans, for the text coincides with that of YÁJNYAWALCYA (140). Since there is no ground for selection, both delivery and receipt are meant. Or if a man erroneously make a present, receipt is forbidden; if he erroneously take a present, gift was forbidden. If the prohibition of receipt be infringed, the benefit of a gift for a religious purpose is lost; if the prohibition of gift be infringed, the thing shall not be obtained at a subsequent time: hence both are intended.

Again; delivery and receipt may signify the delivery of a thing relinquished on a religious account, and the receipt of that thing. If that prohibition be infringed, what moral purity can he acquire by yielding joint property to one of the owners? Or how can the donee forfeit *his share in* the merit of the gift, by receiving his own property, which in reality produces moral benefit common to both owners? Such is the objection *to the interchange of presents between parceners.*

Under this text (141) the attestation of brothers and so forth is only proper in matters concerning that property, in respect of which they are separate; and it is only improper in matters concerning that property, in respect of which they are coparceners.

If one allege in the king's court, "this man is my debtor," and the other affirm, "I am not his debtor;" that suit being tried, if three strangers depose to the debt, and seven parceners depose against the debt, the

* Book V, v. 388, 3.

negative plea would prevail by the text of YÁJNYAWALCYA:* to prevent this *circumstance*, their testimony is forbidden. Therefore, setting aside the negative plea, though supported by the evidence of many parceners, the debt proved by strangers should be adjudged. "A kinsman might speak *falsely* through the impulse of natural affection." This and other points should be discussed under the title of Administration of Justice.

And that (which is stated in the text 141) *is forbidden* without mutual consent; but with mutual consent, even undivided brothers may become sureties and so forth: after partition, they may so act even without mutual consent. The *Mitácshará.*

Sureties are of four sorts.

142.

VRÍHASPATI:—Four sorts of sureties are mentioned by Sages in the system of jurisprudence: for appearance, for honesty, for paying a sum lent, and for delivering the debtor's effects.(51)

2. The first says, "I will produce that man;" the second says, "that man is trustworthy;" the third says, "I will pay the debt;" the fourth says, "I will deliver his effects."

3. On failure of their engagement, the two first, *but not their sons,* must pay the sum lent at the time stipulated; the two last, on default *of the borrowers,* and even their sons, if they die *and leave assets.*

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* The text at large stands thus in the code of that legislator: "If the evidence be discordant, the testimony of the greater number shall prevail; if the witnesses be equal in number, the testimony of the virtuous; if virtuous men depose two inconsistent facts, the testimony of those who are most eminent by their honesty."

(51) In *Sanskrit,* a surety is called *pratibhú;* and the four sorts above described, are distinguished by the following designations:

1. *Darsana-pratibhú.* A surety for appearance.
2. *Pratiyaya-pratibhú.* A surety for confidence; one who engages for the general honesty and responsibility of another.
3. *Dána-pratibhú.* A surety for the repayment of a loan or fulfilment of an engagement.
4. *Dravyarpana-pratibhú.* One who engages to give up property belonging to the debtor if he fails to pay the debt.

It will be seen, however, that NÁREDA (*post* 143) enumerates only three sorts of sureties; namely, for appearance, for payment, and for honesty: and this classification seems to be the one most usually adopted. The first answers to the Persian term *Hazirzamin,* by which the obligor undertakes to produce the person of the principal, in the event of his not being forthcoming. The second is that which Mr. COLEBROOKE terms, "*constitute,* or subsequent undertaking of a person, who engages to pay a subsisting debt, or fulfil an existing obligation of a third party." The third signifies a security for the purpose of confidence, and his undertaking is that which has been described by the same writer, as a "*mandate,* or precedent undertaking of a *mandant* for another's benefit, bidding one trust another, lend him money, allow him credit, manage business for him, or become answerable for his default."—(COLEBROOKE, Obl. and Con., Ch. X, sect. 282.) In the second and third sorts of engagement, the death of the contracting party extinguished the obligation; but in the first case, the obligation devolved on the representative of the deceased surety.

In the Roman law, prior to JUSTINIAN, three sorts of sureties were recognized; namely the *fidejussores,* or *sponsores,* or *fidepromissores.* The last two scarcely differed except in name; but both were distinct from the *fidejussores.* A man was *sponsor, fide promittor,* or *fidejussor,* according as his answer to the creditor, was *spondeo, fidepromitto,* or *fidejubeo:* but JUSTINIAN abolished these differences. GAIUS 3, Sect. 127. The former two were not liable *in solidum,* for the debt of the principal, but each for his own share, which liability did not extend to their heirs; but the *fidejussor* was a collateral security in case of the failure of the principal, and might be required in every kind of contract.—EDITOR.

The construction is, four sorts of sureties are mentioned in the system of jurisprudence. The first for appearance, that is, for producing the party; in short, he is surety for appearance. So likewise in respect of sureties for honesty and for payment. "For delivery of the debtor's effects;" for delivery of his assets to the creditor. The *Retnácara.*

Thus the creditor says, "he will not repay my loan, for he is dishonest; who will obtain the money from him and pay it to me?" In reply, the surety for producing the debtor's assets says, "I will deliver his assets." *In* the subsequent verse, *the terms*, "I will deliver his effects," are expounded "I will deliver assets of that debtor equal to the sum lent," that is, effects sufficient for the purpose of payment.

But modern authors expound it, surety for the delivery of the debtor's mortgaged property. For instance: the borrower contracts a debt on the mortgage of a field, and the creditor asks "who will deliver to me the produce of that field?" In such a case, the surety for the delivery of the debtor's effects says, "I will deliver his property;" that is, the property of this debtor, namely the produce of the mortgaged field. MISRA.

MISRA contends for another reading, *rĭné dravyárpané* instead of *rĭni dravyárpané*. It is explained, for restoring a thing lent to be used. A thing lent for use is anything which a man asks and obtains from another, such as ornaments and the like. For instance: one says, "give me ornaments for decoration on a day of festivity at my house;" the owner asks, "if thou do not restore them, what shall be done? In such a case, the surety for delivery says, "I will restore these effects." Here, since those ornaments are the sole property of the original owner, there can be no payment; it is therefore said for delivery or restoration. Consequently sureties for appearance and honesty may concern a loan for use as well as for consumption: in respect of a debt there is also a surety for payment; and in respect of loans for use, there is also a surety for restoring the chattel. In cases of debt, therefore, sureties are of three sorts; and there are also three sorts of surety for restoring a chattel: but generally sureties are of four sorts. This gloss is consistent with the sense *of the text*.

On this we remark, that *rĭné* is a reading approved by ŚÚLAPÁNI. The construction is, "in respect of debts, four sorts of sureties are mentioned." When an artist is required by the king for service during a long space of time, there are only three sorts of sureties for him; a surety for appearance, a surety for honesty, and a surety for work. In some instances sureties are of five sorts, as will be mentioned. But in matters of debt there are only four sorts of surety. The meaning of "surety for delivey of effects," must be explained according to the modern interpretation, or according to the preceding gloss.

Here an observation should be made in regard to what has been already noticed in the discussion of Loans secured by a Pledge. Some person lends money to a servant, being told by his master, "I will not pay my servant's wages unknown to you." It has been said, that in such a case the servant's master becomes a surety; and, according to the modern interpretation and the last gloss, he is only surety for delivery; but according to other opinions he is surety for honesty. *As* a creditor, relying on some person's affirmation, "this man is trustworthy," lends money to the borrower; so, *in this instance*, he lends money to a borrower in confidence of recovering the sum from him, relying on the promise, "I will not pay his wages unknown to you." The servant's master shall therefore be

compelled to pay the debt, if he falsify his word. But he shall only be compelled to pay the amount of the wages, and not the whole debt if it exceed the wages; for the servant's master only became surety for a debt equal to the wages.

The second says, "that man is trustworthy" (142, 2); this form is merely illustrative, as has been already noticed. "The two first must pay the sum lent on failure of their engagement" (142, 3); the two first, the surety for appearance and the surety for honesty, must pay it on failure of their engagement, that is, should the words uttered by them prove untrue. For example: if the surety who said "I will produce that man," do not produce him, he must pay the debt. So the surety for honesty, who said "that man is trustworthy; he is honest and will not be averse from discharging the debt;" or, "he will not take refuge with thy professed enemy;" must pay the debt, if it be proved that the debtor evades the payment of the debt, is dishonest, or has taken refuge with a professed enemy of the creditor. The same must be understood with respect to the master's servant in the case supposed.

The surety for honesty is belied when the debtor does not pay the debt, and that surety must therefore make it good. It is the same in the case of a surety for payment. Does it not follow, that there is no difference between a surety for honesty and a surety for payment? No; they differ in many points. If the surety said, "that man is honest;" and afterwards, if the debtor, being reduced to indigence by conflagration, by the depredations of robbers, or the like, have no assets whatever for the payment of his debts, his honesty is unimpeached; for *in such circumstances* there is no sin in his not discharging the debt: the surety for honesty shall not in this case be compelled to pay the debt. But if the surety say, "I will pay the debt," then indeed that surety for payment shall be compelled to pay it. Such is the difference. Again; if the surety for honesty say, "that man is wealthy," in such a case, should it be proved that he was then indigent, the surety for honesty or trust shall pay the debt, even though the inability of the debtor be the cause of its remaining undischarged *by him*. But if wealthiness be proved, and the debtor withhold payment through dishonesty or the like, a surety for payment would in that case be compelled to discharge the debt, not the surety for trust. This also constitutes a difference. There is again a difference in the case of the debtor's decease; and various distinctions may also be deduced from other circumstances.

In fact, when the surety for honesty says, "that man is trustworthy;" if he punctually paid debts formerly contracted from others without dispute, and never did a dishonest act, but subsequently practise knavery in regard to the payment of this debt, the surety is not in that case amenable; for none can know future events. But, when the surety for honesty says, "that man will practise no knavery; of this I am well assured; confiding in my words, lend him the money without hesitation;" then indeed, should the debtor afterwards practise knavery, the foolish surety must pay the debt. If a surety affirm, that a dishonest borrower is honest, then this surety for honesty is belied and must pay the debt. Providing for this case, the text of VṚIHASPATI expresses, "the two first must pay the sum lent."

"At the time stipulated" (142); at the term, as stipulated *by the debtor*. For example; when the debtor promised, "I will discharge the debt in such a year and month, on such a day," it must be paid on that very day in that month and year.

"The two last (the surety for payment and the surety for delivery), on default;" *they shall be compelled to fulfil their engagements*, if they do not spontaneously pay the debt, or deliver the effects. The *Retnácara.*

Here, "at the stipulated term" must be supplied after the words "pay the debt."

"If they be dead;" literally, without them: on failure of the surety for payment and of the surety for delivery, in consequence of their death, absence, or religious seclusion from the world. Consequently, should a surety for appearance or honesty die or go to a foreign country, his son is not bound; but if a surety for payment or delivery die or go to a foreign country, his son is held bound.

It should be here noticed, that, so long as the surety for appearance or honesty be forthcoming, the debt is secured by a surety, and bears interest at the rate of an eightieth part increased by an eighth (27). If they die, or go to a foreign country whence their return cannot be expected, the debts are thenceforward unsecured by pledge or surety, and bear interest at the rate of two in the hundred. But the grandson of a surety for payment or for delivery is not bound *by his grandfather's engagements*, as will be mentioned.

143.

NÁREDA:—Three sorts of sureties, for three purposes, are mentioned by the wise; for appearance, for payment, and for honesty:

2. If the debtors fail in their engagements, or if *his* confidence misled *the creditor*, the surety must pay the debt; and so *must the surety for appearance*, if he do not produce *the debtor.*

For three purposes in respect of things, namely for payment, appearance, and honesty, three sorts of sureties are mentioned. What is to be done by them? The Sage declares it (143, 2). "If the debtors fail in their engagements," if they do not discharge the debt, "the surety," namely the surety for payment, must pay the debt. "If *his* confidence misled *the creditor*;" that whereby a man confides, is confidence. If what is meant by that term, namely the confidence of the surety for honesty, produce incongruity, or excite an erroneous notion, (for the word has an inflection which bears a causal sense;) that is, if the assertion of the surety produce error, or in other words if it prove false, *he must pay the debt.* If the reading be *vibódhité* instead of *viródhité*, *it must be thus explained*; if confidence, or the notion excited by the assertion of the surety for honesty, be misconceived, or prove contrary to fact; that is, if it prove false; or, in short, if the debtor be dishonest; the surety, namely the surety for confidence, must pay the debt. Such is the meaning. "If he do not produce *the debtor in court*;" the text must be so supplied: if he do not compel the appearance of the debtor, the surety, namely the surety for appearance, must pay the debt.

But the surety for delivery is not here mentioned; in the text of NÁREDA, therefore, three sureties only are noticed. The apparent inconsistency is thus reconciled, according to MISRA; the text of NÁREDA concerns only sureties for debts, but the text of VRIHASPATI concerns both loans

for consumption and loans for use; there is not, consequently, any contradiction. But, according to others, the surety for delivery falls under the *general* description of surety for payment; for there is no *material* difference between a surety for the delivery of mortgaged property or of the debtor's assets, and one who has undertaken the payment *of the debt:* entertaining this notion, NÁREDA has only mentioned three sorts of sureties. Distinguishing this form of agreement, "if the debtor do not pay the debt, it shall be paid by me," from this form, "obtaining assets from the debtor, I will deliver them," or distinguishing the engagements to pay the money lent, and to deliver the property mortgaged, VRĬHASPATI has discriminated the surety for payment and surety for delivery: there is not consequently any inconsistency. In effect there is no difference of meaning. The text is cited by HELÁYUDHA and CHANDÉSWARA, and is therefore inserted in this Digest, though not quoted by LACSHMID'HARA and others.

144.

YÁJNYAWALCYA:—Suretiship is ordained for appearance, for honesty, and for payment; the two first *sureties, and not their sons,* must pay the debt on failure of their engagements, but even the sons of the last *may be compelled to pay it.*

The two first, the surety for appearance and surety for honesty, must pay it on failure of their engagements. Even the sons of the surety for payment may be compelled to pay the debt. The *Dípacalicá.*

Since the son of the surety for payment is alone declared liable for the debt, it appears that the son of a surety for appearance or for honesty is not liable for the debt. Herein the author of the *Mitácshará* concurs: but he has delivered this gloss on the term "honesty" or trust; *the surety says,* "confiding in me, lend him the money; he will not deceive thee, for he is son of such a one; his land is very fertile; and he has an excellent estate:" and all other circumstances are *in this manner* almost fully particularized. That no real inconsistency with the text of VRĬHASPATI exists, has been already explained in the gloss on the text of NÁREDA.

145.

CÁTYÁYANA:—*Let the king* cause sureties to be given for payment, for appearance, for confidence, *or for honesty,* for the matter in contest, and for ordeal; on failure of their engagements *they shall be liable* according to circumstances.

"For payment;" for the discharge of the debt, and for the delivery of mortgaged property and the like. "For appearance;" for producing the debtor. "For confidence;" for trust: the words are synonymous. "For the matter in contest" with the creditor. "For the performance of ordeal:" that surety shall be compelled to pay the debt "on failure of his engagement;" or, *in other words,* if the engagement be not performed. Such is the sense, as apprehended by CHANDÉSWARA.

"For the matter in contest;" a suit being instituted by the creditor for the recovery of money from the debtor, he whom the king takes as a surety, lest the debtor or creditor abscond through apprehension of losing

the cause, is surety for the action, the fourth sort of surety, as *also directed* by a text which will be quoted from YÁJNYAWALCYA.* This surety says, "if that man do not appear to *defend* the suit, he shall be produced by me;" or he says, "I will perform what may be required from that man."

Afterwards, during the procedure, if ordeal must be performed by the party himself, he whom the king, under the text of YÁJNYAWALCYA, takes as a surety, suspecting the creditor's or debtor's wish to abscond, because he perceives the probable detection of his falsehood, is surety for ordeal, the fifth sort of surety. He says, "when this debtor should pass ordeal, I will "then produce him;" or he says, "I will perform his office." This should be understood incidentally in the case of a surety for the creditor.

This text should be placed under the title of Administration of Justice. It carries an *apparent* inconsistency with the text of VRĬHASPATI, where four sorts of sureties are propounded. That may be reconciled: the text of VRĬHASPATI concerns debts alone, but the text of CÁTYÁYANA concerns law-suits in general; there is no contradiction. Or the sureties for the action and for ordeal fall under the description of sureties for appearance, distinguished, *however*, by the difference of agreement. Accordingly MISRA says, the surety for attending the decision of the suit, and for ordeal and the like, as mentioned by CÁTYÁYANA, is included in the surety for appearance and the rest.

According to the last interpretation *of the text of* VRĬHASPATI, consistent with the gloss of SÚLAPÁNI, "matters of debt" being there specified, the apparent contradiction is obviously reconciled in this mode: in matters of debt there are four sorts of sureties, but for law-suits *in general* there are five sorts. Some however hold, that when a suit is instituted, he who is appointed by the plaintiff or defendant, who is himself unable to act, to be his representative for the pursuit or defence, is surety for the action. By the nature of the undertaking, if he be cast, his principal is cast; and if he prevail *in the suit*, his principal prevails. The king should exact from the principal a written engagement in this form, "his success or defeat shall fall on me."

A written acknowledgment should be executed by sureties in their own handwriting, or in that of another person. In the margin of the written contract of debt, the surety may write, "I such a one, son of such a one, "will produce unto thee such a one thy debtor, on a certain day, month, "and year, (*specifying the time* when the debt ought to be discharged,) "provided he have not paid the debt before that time; should I fail herein, "I will myself discharge the debt with interest." A surety for confidence should execute a similar obligation, but call himself "surety for confidence," and after inserting the name of the borrower, and other particulars, conclude by declaring "that man is honest; if this assertion prove false, the debt shall be paid by me." So in the case of a surety for payment, for delivery, for the action, or for ordeal, the undertaking abovementioned should be duly recorded in writing. By the surety for the action, according to the last-mentioned opinion, an undertaking may be reduced to writing in this form, "I will answer the plea so long as the suit remain *undecided*." This and other points may be reasoned according to received practice.

* Not again cited in this Digest. I subjoin the translation according to the gloss of RAGHUNANDANA: "From both parties a surety must be taken, able to perform the decree *by paying the sum adjudged, and so forth.*

That the debt, not being discharged by the debtor at the stipulated period, must be paid by the surety for payment, is evident from the expression "on failure of their engagements." A special rule is declared in respect of a surety for appearance.

146.

CÁTYÁYANA propounds it:—If a surety for the appearance of a debtor produce him not at the time and in the place *agreed on,* he shall discharge the debt, unless he was prevented by the act of GOD or the king.

2. After the time *of difficulty* has past, the surety, who still does not produce him, shall pay the debt; and the same law is declared, even if the debtor should die.

"At the time and in the place;" the surety for appearance having promised, "I will produce the debtor at such a time and in such a place," if he do not produce him at that time and in that place, becomes liable for the condition of the writing, namely, for the debt; that is, he must pay the debt to the creditor: such is the sense of the first part *of the text:* and this was conveyed by a former text; but a special rule is subjoined, "unless he was prevented by the act of GOD or the king." If the debtor abscond through fear of the king, in consequence of another's fault, or if he go to another country, promising to return at the close of a month, but be detained by illness a year *or more,* the surety for appearance is not blameable for not producing the debtor.

"After the time has past;" after the king's violence has past away, and so forth. After relief from *apprehension of* the king's violence, or after his return to his home on recovery from sickness, if the surety still do not produce him, through dishonesty, inability, or the like, *the king* shall compel the surety to pay the debt. The text should be so supplied.

"And the same law is declared, even if the debtor should die;" that is, the surety must pay the debt. The *Retnácara.*

This opinion, literally taken, is inconsistent with reason; for favour is shown him if he be prevented by the act of GOD or the king, but none is shown in the case of death, which is the most absolute hindrance arising from the act of GOD. Its purport must therefore be assumed according to the exposition of VÁCHESPATI MISRA; and that is meant in the *Retnácara.* His exposition is as follows: when the time, at which the surety undertook to produce the debtor, has past without any hindrance from the act of GOD or the king; or, in the case of hindrance by the act of GOD or the king, after that *difficulty ceased;* if the surety still procrastinate, thinking, "I am surety for appearance, and not bound for payment; I will produce the debtor two months hence, but at present I will attend to my own business;" in such a case, if the debtor afterwards die, the surety must pay the debt. Such is the sense of the phrase: and this is also the import of the text of VRĬHASPATI, "on failure of their engagements, the two first must pay the sum lent" (142, 3). MENU also declares, that the surety for appearance must himself pay the debt, if he do not produce the debtor.

147.

MENU :—The man who becomes surety for the appearance of a debtor in this world, and produces him not, shall pay the debt out of his own property.

Must dispose himself to pay the debt out of his own property.

CULLÚCABHATTA.

Here it should be observed, that when the agreement is simply this, "I will produce or show the debtor at such a time," and no place be specified; if he show him on that very day, while busied in holy worship or the like, or occupied with other affairs, and so forth, it might be supposed, on a cursory view, that the agreement is not violated: but we humbly think it reasonable to affirm, that in such a case the agreement is infringed; for the creditor requires the debtor to be produced at the time agreed on, that he may recover the sum lent; he requires him to be so produced, as may tend to the recovery of the money: this the surety undertakes to fulfil, and the terms of his engagement must be so understood; but it is not fulfilled by indicating *the debtor* at such a time, when he is not amenable: the surety must therefore show the debtor at a time when he is at leisure, *and amenable.* Such is the modern mode of interpretation.

A rule has been propounded for the case of a debtor absconding through the fault of another; what is the rule if he abscond to evade payment of the debt? On this point,

148.

VRĬHASPATI declares :—Let the creditor allow time for the surety to search for the debtor who has absconded; a fortnight, a month, or six weeks, according to the distance of the place *where he may be supposed to lurk:*

2. Let no sureties be excessively harassed; let them gradually be compelled to pay the debt; let them not be attacked if the debtor be at hand, *and amenable:* such is the law *in favour* of sureties.

"For the debtor, who is missing, or has absconded;" according to the literal sense of the verb *n'aś*, be invisible, or not to be found. "According to the distance of the place;" according to the remote or near situation of the place, and so forth. "Gradually:" without the consent of the surety, the whole sum shall not be at once exacted at the stipulated term. "If the debtor be at hand;" if he be present, or if he be willing to pay the debt, sureties must not be required to produce the debtor, or pay the debt.

In respect of a surety for honesty, a text of law cited in the *Retnácara* propounds a rule.

149.

Smrĭti :—From a malicious debtor, who is on any account disposed, through enmity, to take the protection of a stranger, *professedly hostile to his creditor*, or to do anything inauspicious *to him,* or to adopt the conduct of wicked men.

2. Let a surety for honesty be taken *as a precaution* against such behaviour; if his conduct belie the promise, his surety must pay the debt.

" From a malicious debtor, who is disposed, &c.;" whose mind is bent on taking the protection of a stranger, that is, of a professed enemy to the creditor; on doing anything inauspicious to the creditor; or on adopting the conduct of wicked men, such as thieves and the like. Why should a debtor take the protection of his creditor's antagonist? In reply to this, he adds, "through enmity:" lending his own money, the creditor confers a favour; when he demands his money, the malice of a wicked man is roused. This is obvious. The *Retnácara.*

"*As a precaution* against such behaviour;" lest he should take refuge with a professed enemy *of the creditor*, and so forth: let some person be taken as surety for honesty or confidence; that is, for the certainty that he will not seek the protection of a professed enemy, and so forth. Such is the sense of the first phrase. He is in reality surety for honesty. He says, "that man is honest, he will be ready to pay the debt, and will not take refuge with *thy* professed enemy."

"If his conduct belie the promise;" if it be different from what was promised: taking the protection of the creditor's enemy, if he discharge not the debt, the king shall compel the surety to pay the debt at the close of the stipulated term. Such is the sense of the last phrase: and this is also the import of VRĬHASPATI's expression, "on failure of their engagements, the two first must pay the sum lent."

On this *text* (148) CHANDÉSWARA remarks, that "wherever confidence is wanting, the king should require a surety for confidence *or honesty* to be given." Accordingly, if the creditor refuse the loan, apprehending the insolvency of the borrower, and some person affirm, "he is not insolvent;" and if the creditor, confiding in that assurance, lend the money; that person also is a surety for confidence, as has been already noticed. This and other points may be reasoned. Hence BHAVADÉVA has said, if it be affirmed by some person, "that man is not thy debtor, but some *other* honest man," should it be afterwards proved by other evidence that he was the debtor, that cheat is *deemed* a surety. According to this opinion of BHAVADÉVA, it must be understood, that if a cheat, sent by the debtor, make such affirmation, he is only *deemed* a surety for confidence; but if he make that affirmation when questioned by the king or the umpire, he is a perjured witness, and shall undergo the punishment of false testimony.

In law-suits there are three sorts of sureties; the representative of the party who pleads his suit; the surety for his appearance; and the surety for the sum which may be due from him. This and other points may be understood from popular *practice.* It has been almost expressly declared already, and should be further discussed under the title of Administration of Justice.

What should be done in the case of a surety for ordeal, CÁTYÁYANA declares,

150.

CATYÁYANA:—At the time and place when the ceremony should be performed, if he fail in ever so small a degree, the surety shall be compelled to pay the sum as a just debt: such is the law respecting proved debts.

"When the ceremony should be performed;" when ordeal should be performed. The *Retnácara.*

The meaning is, that this concerns ordeal. If the surety for ordeal, having declared, "when ordeal shall take place, I will produce that man," should pass that day, however inconsiderable the delay may be; if he delay it one watch, or even half a watch beyond the day appointed; the surety who entered into that engagement must pay the sum "as a just debt" proved to be due. So much has been delivered by way of commentary on the *preceding* text of CÁTYÁYANA (145). MENU has delivered a text of the same import with the expression of VRĬHASPATI, "and even their sons if they be dead" (151, 2).

'A surety for payment" (151, 2); a surety who has formally declared, "I will pay *the debt.*" Since the text (142) expresses, "even their sons if they be dead," "heirs" *may here signify sons* (151, 2). The *Retnácara.*

Even the surety for delivery, mentioned by VRĬHASPATI, is considered by MENU as the same with the surety for payment. By specifying the surety for payment, he exempts the son of a surety for appearance, or for honesty: and that has been expressly declared by MENU in the text which precedes the passage quoted.

151.

MENU:—But money due by a surety, or idly promised *to musicians and actresses,* or lost at play, or due for spirituous liquors, or what remains unpaid of a fine or toll, the son *of the surety or debtor* shall not *in general* be obliged to pay.

2. Such is the rule in case of a surety for appearance *or good behaviour;* but if a surety for payment should die, the judge may compel even his heirs to discharge the debt.

"Money due by a surety;" what was payable by a surety.

CULLÚCABHATTA.

Idle promises and the rest will be discussed in the Chapter On Payment of Debts.

"The son shall not be obliged to pay money due by a surety:" this, which had been previously mentioned, must be understood of money due by his father, who was surety for appearance. CULLÚCABHATTA.

The word "appearance" must allude to the debtor as a near term. The honest and dishonest proceeding of a debtor had also been propounded: hence the surety for honesty is also comprehended under the text. This YÁJNYAWALCYA makes evident.

152.

YÁJNYAWALCYA:—Should a surety for the appearance or the honesty of another die, his sons need not pay the debt; but the sons of a surety for payment or delivery must pay *the sum lent, or deliver the thing undertaken.*

"Surety for the honesty of another;" surety for *the good behaviour of the debtor,* giving confidence *to the lender.* "Die" is illustrative of seclusion from the world, remote absence, and the like. "The sons of a surety for payment:" the literal interpretation is this; the sons of those who are bound for payment, that is, who are sureties for the discharge of a debt or the delivery of mortgaged property, must pay the sum lent.

"Those who are bound for payment;" the sons of a surety for payment. The *Retnácara.*

A surety for delivery is comprehended under the terms of the text. that in some instances the son of a surety for appearance must also discharge The debt, CÁTYÁYANA declares.

153.

CÁTYÁYANA:—Should a man become surety for the appearance of a debtor from whom he had received a pledge *as his own security,* the creditor, *if that surety die,* may compel his son to pay the debt on proving the whole case.

If he became surety for the appearance of the debtor, after receiving a pledge *for his indemnity,* and the whole case be proved by the claimant or creditor; then, if that surety be dead, his son may be compelled to pay the debt. "Any-how" and "the person bound" must be understood, for the purpose of making the agent in the sentence the same, agreeably to rules of grammar; "*should a man become surety after receiving a pledge, and be any-how proved to have received that pledge, &c.*" "Proved" is in the regular passive form.

Thus a borrower asks a loan of a money-lender, and he requires a surety; but the surety, for his own assurance, demands a pledge: in such a case, he became surety for the appearance of a debtor, from whom he had received a pledge. If that surety die, and the debtor also die, or be unable to discharge the debt, the son of the surety may be compelled to pay it. That debt, however, was not secured by a pledge *delivered to the creditor;* the interest therefore shall be computed at the rate of an eightieth part increased by an eighth. "Appearance" is here illustrative of a more general sense. Hence, if a surety for honesty also take a pledge *as his indemnity* and die *unexonerated,* his son may also be compelled to pay the debt; for MENU, using the expression "a surety other than for payment," intends the surety for honesty as well as the surety for appearance, who are both different from the surety for payment. May not the expression used in the text of MENU (154), "a surety other than for payment," be restricted to the surety for appearance, since that coincides with the text of CÁTYÁYANA? If the surety for honesty have likewise received a pledge, why should not his son pay the debt, since the reason of the law applies equally to both?

Accordingly this gloss is delivered in the *Mitácshará* on the text of CÁTYÁYANA (153): "surety for appearance" is illustrative of surety for honesty. However, the text is there read, "even without assets left by his father," instead of "on proving the whole case."

154.

MENU:—On what account then is it that, after the death of a surety other than for payment, the creditor may *in one case* demand the debt *of the heir,* all the affairs of the deceased being known and proved?

This is a question proposed. "Surety other than for payment;" different from the surety for payment, namely a surety for appearance *and so forth.* "All the affairs of the deceased being known and proved:" the circumstances, such as the receipt of a pledge, *being proved,* that having been taken; and the receipt of the pledge by the surety being known and proved, and so forth. "The creditor, literally the giver;" the person who delivered a loan. After the death of that surety, on what account, and from whom, can he demand payment of the debt, since the surety *himself* is dead? This is a question proposed. The answer follows:

155.

MENU:—If the surety had received money from the debtor, and had enough to pay the debt, the son *of him* who so received it shall discharge the debt out of his *inherited* property: this is a sacred ordinance.

If the debtor had given money, if money had been given by the debtor, (to the surety of course, from the purport of the text;) then the surety has enough to pay the debt; he has a lien on money applicable to the payment of the debt (money of course received from the debtor). His son therefore shall discharge the debt "out of his property." The money so received is referred secondarily to his son. "This is a sacred ordinance;" it is directed in the system of jurisprudence that he shall discharge the debt. Such is the interpretation delivered in the *Retnácara.* But CULLÚCABHATTA explains the term as an epithet of surety; it signifies one to whom property has been given as a pledge: and thereby having in his hands a lien on a sum sufficient to pay the debt, *his son shall discharge it.*

HELÁYUDHA otherwise expounds the phrase, "all the affairs of the deceased being known and proved:" 'the circumstance of his not having received any pledge being known and proved.' Thus, if he became surety without having received a pledge, and the whole case be known and proved, on what account could the creditor demand the debt *from his son* after his death? Of course on no account. Hence, after the death of one who became surety for the appearance of another without receiving a pledge, the judge shall not compel his son to discharge the debt. But the subsequent text (155) is explained as above. In effect there is no difference. However, the law concerning money due by a surety for appearance, already propounded (151), would be *vainly* repeated in the subsequent text (154).

"If the surety had received money;" if property had been delivered to him not amounting to gift. Consequently, if effects had been delivered to the surety by way of deposit, without declaring a positive gift and so forth; if the surety be such, *we say*, his son shall discharge the debt out of his property, namely the property which is in his possession held as a deposit. He must discharge it, although he hold no property given *to him*. This takes place when the surety for appearance has not produced the debtor and that debtor afterwards die, or, though living, is insolvent. This case is intended Or, with a view to the case of a surety for payment, this text (154) enforces the sense of the preceding text. "All the affairs of the deceased being known and proved;" the whole circumstance of his not having received a pledge being known and proved. On what account then might the creditor demand the debt, after the death of a surety for appearance, who had received no pledge? It follows of course, that on no account can he demand it. By the condition specified, that the receipt of no pledge be proved, it is intimated, that, if he became surety for the appearance of a debtor, from whom he received a pledge, then, should he die, the creditor may recover the debt from his son.

If there be several sureties, by whom must the debt be paid? and what shall be the decision of such a case? For instance; if there be many sureties for payment, or many sureties for appearance, or honesty, who have received a pledge; in such a case may payment be required from any one of them? or must they all pay their proportionate shares of the debt? or each severally pay the whole sum?

156.

YÁJNYAWALCYA:—When there are two or more sureties jointly bound, they shall pay their proportionate shares of the debt; but when they are bound severally, the payment shall be made *by any one of them*, as the creditor pleases.

At the time of contracting the debt, if it were settled by the express declaration of the creditor or of the debtor, or by the engagement of the sureties themselves, that the creditor shall receive the debt from the hands of any one of several sureties bound for the same debt, this text propounds a rule of decision for that case. Two or more persons may become sureties in consequence of the creditor's requisition: for instance, he may require several sureties, reflecting, "if a single surety die as well as the debtor, from whom could the debt be recovered?" Or the debtor may ingenuously give several sureties. Other cases may be easily supposed.

The sense of the text is this: when there are many sureties, they must make up the sum according to their proportionate shares, and pay it to the creditor. The whole meaning is, that the general law directs payment of the debt by proportionate shares, in the case of many sureties for the same debt. He propounds a special rule: "but when they are bound severally, &c." If they be bound in the same manner as a single surety: if any man singly become surety for a debt, as that whole debt must be discharged by him, so, if they become severally bound for the payment of the whole debt, *it may be exacted from any one of them.* When these sureties become so bound, the payment shall be made *by any one of them*, as the creditor pleases. Consequently, should the creditor choose to require payment of

the whole debt from DÉVADATTA alone, it must be discharged by DÉVADATTA alone; if he choose to require payment of the whole debt from any one of them, it must be paid by any one of them: but if he choose to require it from all proportionally, it must be discharged by all the sureties. In this and other similar modes should be understood the creditor's option.

If the creditor be desirous of exacting payment of the whole debt from each of the sureties, what would be the consequence? Since that is contrary to justice, his wish of exacting an undue sum would be fruitless: for, who can obtain many hundred *suvernas* for a loan of one hundred *suvernas*? To detail the reason of the law would unnecessarily swell the book; it is therefore unnoticed.

Should the creditor choose to exact payment of the whole debt from any one surety, it is settled that he must discharge it. Having paid it, may that surety recover from all the other sureties their proportionate shares of the debt? On this question a certain author has said, he shall not recover *their proportionate shares from the other sureties*, since no law *has expressly declared it*: for the general rule directs, that "they shall pay their proportionate shares; and it is intimated by a special rule, that "payment shall be made as the creditor pleases." Consequently, when there are two or more sureties bound like a single surety for the payment of the whole debt without mutual connection *or joint responsibility*, then the payment shall be made as the creditor pleases: he may exact payment of the whole debt from any one of them, or from all the sureties, under the authority of that special rule. In a different case, when two or more sureties are jointly bound, they must pay their proportionate shares of the debt: how could one surety, having discharged the whole debt, recover from the rest their proportionate shares, when all were severally bound like a single surety? The law forbids it.

That is wrong; for the general and particular rules would be irrelevant, since there would be no contradiction of sense, *or exception*. In all cases where two or more persons have become sureties, all the sureties shall pay their proportionate shares of the debt; but if they be severally bound like a single surety, another distinction is stated, namely, that payment shall be made as the creditor pleases: as in the injunction, "give curds to the priests, *and diluted curds to the* CAUNDINYAS," meaning to those who have officiated at the solemn rites.* In fact, the expression, "as the creditor pleases," should be considered only as a circumstance of the action. That action is suggested by the nearest term, "they shall pay:" and the agents in the sentence are the sureties just mentioned. It appears, therefore, that immediate payment must be made by the exertion of any one of them, or by all the sureties, at the option of the creditor; and that exertion consists in making up the sum by any possible means, and so forth. It follows, that all must *ultimately* pay their proportionate shares of the debt. There is not consequently any difficulty. Again; if any one surety refuse to pay his share *of the debt*, the king shall compel him to pay it. But if any one of many sureties say, "I will alone discharge the debt," no law directs that it shall be solely paid by him; reason alone suggests it.

When the debtor gives a second surety for payment, or for appearance, to the surety for payment; in that case also, like a creditor obtaining the sum from the surety who is responsible to him, the original surety should

* I insert the whole example, which is incomplete in the citation. The special injunction is an exception to the general precept. But a rule, unconnected with, and independent of another, is not a particular or exceptive rule.

pay the debt to the creditor; but the subordinate surety cannot be attacked by the original creditor. So, in other cases, a rule of decision may be deduced by *the reader* himself.

If the sureties become severally bound, each for his own undertaking, they may each be severally compelled to pay the whole sum, *for which he became bound*, to the creditor. In this gloss of the *Vivāda Retnācara*, "each severally" signifies one by one; intending the case of more than one *separate engagement*.

"As the creditor pleases:" for instance, when the engagement is made, the creditor says, "at my option the sum may be exacted from any one surety; I am not restrained to make a joint demand; any one surety must pay the whole sum." Such is the sense. The *Vivāda Chintāmeni*.

This point has been sufficiently explained by the text of VRĬHASPATI (142, 3). If the surety for payment die, it is established that the debt may be recovered from his son; shall it be recovered with or without interest?

157.

VYÁSA:—The son of a son shall *in general* pay the debt of his grandfather, but the son *only* shall pay the debt of his father incurred by his becoming a surety, *and both of them* without interest; but it is clearly settled, that their sons, *the great grandson and grandson respectively*, are not *morally* bound to pay.

The sense is, the grandson must pay the debt which was contracted by his paternal grandfather without giving a pledge. This must be considered as appertaining to the title of Payment of Debts. "The debt of his father incurred by his becoming a surety;" if his father became surety for the payment of a debt due from any person; or, taking a pledge, became surety for his appearance or honesty; then, should the father die, his son must pay that debt without interest; he must only pay the exact sum borrowed, and no interest upon it. Consequently, the entire debt of the grandfather must be paid by the grandson without interest; and the debt of the father, incurred by his becoming a surety, must be paid by the son without interest. The *Retnācara*.

Here the entire debt of the grandfather signifies the debt contracted by the grandfather with a stipulation of interest. "Their sons are not *morally* bound to pay;" a son of the grandson, and a son of the son. The great grandson need not pay any debt of his great grandfather, nor the grandson the debt of his grandfather incurred by becoming a surety.

158.

CÁTYÁYANA:—Money due by a surety need not on any account be paid by his grandsons, but in every instance such a debt incurred by his father must be made good by a son without interest.

The debt of a grandfather, incurred by his becoming a surety, need not be paid by grandsons: such a debt shall only be paid by a son; still, however, without interest. To denote this, the particle is employed. The connective sense is, that the son is also exempted from the payment of interest. From the expression "in every instance," a certain author has deduced, that the debt of his father, incurred by his becoming a surety, or on his own

account, shall be paid by the son without interest, as a debt incurred by his grandfather *is paid* by a grandson *without interest.* That is wrong; for it is inconsistent with a text which will be cited from VRÍHASPATI (167, 2), and with the gloss of CHANDÉSWARA, "the debt must be paid by sons with interest, as if it were their own." Hence the expression "in every instance" must be understood to signify "in every instance of a surety for payment and so forth."

159.

Smrĭti, cited in the *Mitácsharà*:—Should the debtor be insolvent and the surety have assets, the principal only must be paid *by his son*; he is not liable for the payment of interest.

This text also ordains the payment of a debt without interest by the son of a surety for payment. What proof is there that the debt shall be discharged without interest by the son of a surety for the appearance or honesty of a debtor, from whom he had received a pledge? It should not be affirmed, that the text of CÁTYÁYANA above cited, expressing "in every instance," *is authority for exempting him from the payment of interest*; for that may be otherwise expounded. Nor should it be affirmed, that the text of law cited in the *Mitácshará* may authorise that inference, if "assets" be explained "a pledge." The author of the *Mitácshará* does not warrant such an interpretation.

On this point it is said, there is no authority for asserting that the debt shall be paid with interest. The text of CÁTYÁYANA directs generally, that a debt incurred by a surety shall be discharged without interest. Consequently that is settled in every instance of a debt incurred by a surety: but in the present instance the consequence might be inconsistent with reason. It cannot be true that the son of him who, having received effects worth ten pieces of money, became surety for a debt of five pieces, shall pay the debt without interest. If a chattel of small value have been received as a pledge, then only shall the debt be discharged without interest; but when valuable effects have been received, why should payment be accepted without interest while the assets are sufficient for the *whole* debt? The debt must therefore be discharged with interest; and the surety must restore the surplus, if there be any, to the debtor or his family.

This decision regards a pledge which may not be used: it is not fit that the surety should use the pledge: but if it be used, payment must be made in proportion to the use and profit *of the pledge.* If it be asked, the pledge received being of very inconsiderable value, might not the whole debt, even without interest, be fully discharged? the answer is, even that is admissible: accordingly it is expressed in the text of MENU, "if the surety had enough to pay the debt;" and in the gloss of the *Mitácshará*, "if he had received a sufficient pledge." Should the son of the surety also die, the successor of the debtor, who has received his heritage, should withdraw the pledge from the grandsons of the surety, and himself discharge the debt. Such is the meaning.

If there be two or more sureties for the same debt, and one of them die, leaving a son, should it be the creditor's choice to recover the debt from the son, he must receive it without interest, and not with interest. But, should it be the creditor's choice to recover the debt from another surety, the son of the deceased surety must pay his proportionate share; but he need not pay interest, for he is the son of a surety. The creditor, however, may reco-

ver the debt with the whole amount of interest, since the surety *called upon* must immediately pay *the whole sum.* Whence then can the interest be recovered on the share of the debt which is payable by the son of a deceased surety? To this it is answered, if there be many sureties severally bound like a single surety, should any one of them die, leaving no son or other *heir liable for the debt*, from whom could his share of the debt be recovered? Consequently, as in that case the surviving sureties must contribute their proportionate shares *of the deficiency*, and discharge the debt, *although* "payment be made as the creditor pleases;" so in this case also, even though the son be living, he is as it were non-existent in respect of interest: consequently the surviving sureties, together with the son of the deceased surety, must contribute their proportionate shares of the principal sum, but the amount of interest must be made good by them, unaided by that son.

But some lawyers remark, when the creditor makes his election of recovering the *whole* sum from one surety, he shall receive it from one alone; how can the surety, who discharges the debt, recover proportionate shares from the rest? But if the creditor have chosen to receive the sum from all the sureties in due proportion, then the son of a deceased surety must pay his share of the debt without interest. Again; when five persons have become jointly bound as sureties for a debt, then, should one die, his share of the debt must be received from his son without interest: but if he leave no son, or other *amenable heir*, his proportionate share is lost; since it was virtually understood, when the agreement was made, that the five persons were each bound for a fifth part of the debt. Yet, if it were agreed, "should any one of us die, the debt must be discharged by such of us as survive," then the whole debt must be paid by the surviving sureties contributing their proportionate shares. This is mentioned merely as an example; that in other cases also the adjustment must be made according to the tenor of the agreement, may be easily inferred by the reader himself.

Shall the surety, *thus becoming* a creditor, recover what has been paid by him to the *original* creditor, in consequence of the debt remaining undischarged by the debtor though living, but insolvent, dishonest, or the like?

160.

VṚIHASPATI ordains:—Should a surety, being harassed, pay the debt for which he was bound, he shall receive twice the sum from the debtor, after the lapse of a month and a half.

"A surety;" a person who has become bound *for another*. "Being harassed;" being adjudged by the arbitrators to pay the debt *in this form*, "since he became surety for that man, he must pay the debt to the creditor." "After the lapse of three fortnights, *or a month and a half*;" after forty-five days. A debt of one hundred *suvernas*, having accumulated with interest to two hundred *suvernas*, is again doubled, and amounts therefore to four hundred *suvernas*; that sum he shall receive from the debtor. The cause of doubling the debt is the offence committed in not immediately paying it.

161.

VISHNU and NÁREDA:—If the surety, being harassed by the creditor, discharge the debt, the debtor shall pay twice as much to the surety

162.

YÁJNYAWALCYA;—When the surety is compelled to pay a notorious debt to the creditor, the debtor shall be forced to repay double the sum to the surety.

"Notorious;" adjudged by arbitrators. "Notorious" should be understood in the text of VISHNU and NÁREDA, for it has the same import with the text of YÁJNYAWALCYA. VRĬHASPATI renders the meaning evident.

163.

VRĬHASPATI:—If dull *sureties* innocently pay the debt, when unbidden, or when required to pay another debt, how and from whom can they recover the sum?

"Dull;" whose understanding is sluggish; being slow *even* in their own affairs, *it is perceived that* their minds are heavy. "Innocently;" without guile. "Unbidden" by the umpire. The *Retnácara.*

The meaning is, not told by arbitrators, "pay the sum to that man." Here "unbidden by arbitrators" also implies, that it is not any-how proved by witnesses that the debt should be paid by the surety. Accordingly YÁJNYAWALCYA says "notorious," that is, not unbidden by arbitrators. So,

164.

CÁTYÁYANA:—The surety shall *immediately* receive from the debtor, *but without interest,* the sum which he has paid, when legally urged by the creditor, on proving the case by witnesses.

On proof by witnesses that the debt ought to be paid. "Urged by the creditor;" mentioned as a matter of course, for payment would hardly be made by one who was not urged. From the expression "he shall receive the sum," it appears that the surety shall receive so much only as was paid by him to the creditor, and not double that sum. But the double sum has been directed by the text of YÁJNYAWALCYA; there is consequently an inconsistency. It must therefore be settled, that within a month and a half he can only receive the exact sum paid, but after a month and a half he shall receive twice that sum. In this case, however, there is no reference to the period in which a debt is regularly doubled, such as fifty months and the like, for no such law exists; the expiration of a month and a half is alone a sufficient term, under the text of VRĬHASPATI (160), to double the sum. Such is the best mode of interpretation approved in the *Retnácara.*

GRAHESWARA and MISRA explain the text of CÁTYÁYANA as intending only the following case: a considerable space of time having elapsed beyond the stipulated term, if the creditor resolve on recurring to the king, but the surety, apprehending punishment, pacify the creditor at a pecuniary expense, and discharge the debt, the surety shall in that case recover from the debtor the money employed in appeasing the creditor; but shall only receive back the exact sum, not twice the amount. But the author of the *Mitácsharà* says, twice the sum must be immediately paid. He holds, that the lapse of a month and a half is not required. To reconcile the text of VRĬHASPATI, money expended in appeasing the creditor must be supposed. On this subject YÁJNYAWALCYA propounds a distinction.

165.

YÁJNYAWALCYA :—Female slaves and cattle delivered *by a surety* must be made good with their offspring; grain *shall* only *be repaid* two-fold; cloth is declared to be quadrupled; and liquids octupled.

"Female slaves and cattle;" a debt consisting of female slaves or cattle. If a surety be compelled by a creditor to deliver female slaves, goats, and the like, they shall be received back by the surety with their offspring only; but grain and the rest with the accumulation mentioned. Other things can only be doubled. The *Dípacalicá*.

The doubling of every kind of property having been suggested, it is here directed by a special law, that liquids shall be repaid octuple; cloth quadruple; and female slaves or cattle with their offspring, that is, with no other recompense but their offspring. If one female goat, having been lent, be made good by the surety, in consequence of the debtor being unable to discharge the debt, then, after the lapse of considerable time, the debtor being able to discharge the debt, one female goat shall be delivered to the surety, and as many kids as have been produced from that *first* goat. If that female goat die *unproductive*, the debtor must afterwards deliver a single goat, and no kids, for none have been produced. "Grain and the rest;" grain, cloth, and liquids. "Other things;" gold and the like. The gloss of the *Dípacalicá* may be taken in a literal sense.

Here an observation should be made. When the surety would have been liable for the payment of the debt, in consequence of the debtor's absence; if the surety be dead, it shall be paid by his son alone, and without interest, as has been mentioned. Afterwards, when the debtor is amenable for the payment of the debt, it is reasonable that he should pay to the son of the surety twice the amount of the original sum paid by him without interest. Must that debtor again pay the *arrear of* interest to the creditor, or not? On this question some remark that the principal sum only, and no interest, has been received from the son of the surety: the interest shall therefore be recovered from the debtor; for it is inconsistent with reason that the creditor should sustain a loss without any fault on his part. But others say, that interest need not in that case be paid by the debtor, since no law directs it. Is not the general law, which ordains interest at the rate of an eightieth part, applicable to this case? No; for that is precluded by the text of CÁTYÁYANA (158), the terms of which are expounded "void of interest;" since, if interest were payable by any person whomsoever, it could not be void of interest. Of these two opinions, preferring that which is best and most firmly established, a single rule of decision should be adopted.

On this *text* (165) the *Mitácshará has this comment:* that kind of property, for which a special *recompense or* rate of interest has been propounded, being paid by a surety, the debtor must immediately make it good, without any reference to particular periods, but with the interest propounded: such is the implied sense. The author conceived, that interest is propounded by the text on female slaves, cattle, and the like: now there can be no interest without a loan, as has been already stated; but female slaves and cattle may be lent by one who is unable to maintain them himself, and wishes they should be supported: this text intends only such a loan.

CHAP. V.

ON THE

PAYMENT OF DEBTS.

A DEBT of such a kind should be paid; a debt of such a kind should not be paid; it should be paid by this heir; it should be paid at this time; it should be paid in this mode: thus the subject is five-fold in respect of the debtor. It is two-fold in respect of the creditor, namely, the rule for delivery, and the rule for receipt. Of these seven topicks of loans and payment, one topick, the rule for delivery by the creditor, has been expounded. Explaining the verb "give" or deliver in the sense of payment, the other six topicks are expounded in *the* two *following* Chapters. Such is the method authorized by the ***Mitácsharà***.

166.

VRĬHASPATI:—By whom, to whom, and in what mode, should, or should not, be paid a loan which has been received from the hands of another in the form of a loan on interest, shall be now declared:

2. If the time of payment be not expressed, the debt shall be paid on demand, *with the interest then due; if expressed,* at the full time limited; and *if not previously demanded,* when interest ceases *on becoming equal to the principal:* if the father should die *in debt,* it shall be paid by his sons, *with interest as far as the law allows.*

By the text of NÁREDA (1) the forensick term of "loans and payment" is stated as comprehending twenty topicks in respect of the creditor and debtor.* The verb "give" or deliver, has consequently the double sense of lend and pay. The topicks suggested by the verb taken in its sense of "lend," namely, the eight-fold rule for delivery by the creditor (interest and

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* By whom	what may be lent what may not be lent what must be paid what need not be paid	to whom		in what form

Rules for delivery Rules for receipt	by the creditor		by the debtor.

the rest), and the rule for receipt by the debtor (stipulated interest, and the delivery of the interest promised, and so forth), which constitute ten topicks of loan and payment, have been directly or virtually expounded. The topicks suggested by the verb taken in its sense of "pay," are now propounded, namely, the eight-fold rule for payment by the debtor, and the rule for receipt by the creditor, which also constitute ten topicks of loan and payment.

"From the hands of another;" from the hands of the lender. "In the form of a loan on interest;" with a declaration, "that shall be repaid with interest by me to him:" the construction is, 'the debt which had been received *in this manner*.' By what debtor that should, or should not, be repaid; to what creditor it should, or should not, be paid; and how, or in what form it should, or should not, be paid. Again; imagining the word "what," the topicks of what should, or should not, be paid, may be understood, as in one reading of the text of NÁREDA (1).

"It shall be now declared;" this, signifying 'almost at the present time,' expresses, that it shall be forthwith declared. The Sage proceeds to the rule for payment (166, 2): that debt, which has been received for no stipulated term, must be repaid on demand; that is, on a simple demand. Consequently, for that loan, which has been received on requesting it in this simple form, "lend me the sum," the rule of payment is such that no delay must be made when the debtor is told, "pay the debt."

When it is settled by both parties, that the will of the creditor shall regulate the time of payment, the debt must be paid on a simple demand; but when another term has been fixed, it must be paid at the full time limited. MISRA.

And BHAVADÉVA says, when *a time* has been settled by both parties as the period of payment, *or when the debt has been made payable* at the option of the creditor, &c. In this gloss the words "specifick time" must be supplied. To both these opinions it may be objected, that the subsequent phrase "at the full time limited" would be a needless repetition. But that phrase concerns a debt for which a time of payment has been fixed. Consequently, for that loan which has been received on application made in this form, "I will pay the debt within two years, lend me the sum *required*," the rule of payment is such that no delay must be made when that period is complete. But when a loan has been received on a simple request in this form, "lend me the sum *required*," and the creditor meanwhile has not demanded it, what should be done? The Sage adds, "when the interest ceases; now interest ceases on the debt after the lapse of time sufficient to double it, as has been already mentioned: that it must be then paid, is the rule of payment for such debts. This and other points may be argued.

It has been thus explained, that the very person who contracted the debt must discharge it. But in the case of his death, the Sage adds, "If the father should die *in debt*, it must be paid by his sons." On failure of the father, who contracted the debt; that is, if he die, or be secluded from the world, or go to a foreign country, the debt must be paid by his sons, with interest. It must be paid even by his son's son, *but* without interest.

167.

VRÍHASPATI:—The father's debt must be first paid, and next a debt contracted by the man himself; *but* the debt of the paternal grandfather must even be paid before either of those.

2. The sons must pay the debt of their father,(52) when proved, as if it were their own, *or with interest;* the son's son must pay the debt of his grandfather, *but* without interest; and his son, *or the great grandson,* shall not be compelled to discharge it, *unless he be heir, and have assets.**

First the debt of the grandfather *should be discharged,* next the debt of the father, and lastly the debt contracted by the man himself: such is the legal order of payment. "As if it were their own;" as their own debts are paid with interest, so must this be paid with interest. "When proved;" when established by the testimony of witnesses. But the debt of a grandfather may be discharged without interest. "His son;" the grandson's son, readily suggested by the preceding term, is thence understood. Consequently the great grandson shall not be compelled against his will to discharge the debt of his great grandfather; but, if the great grandson be willing, it may be discharged by him.

168.

VISHNU:—If he who contracted the debt should die, or become a religious anchoret, or remain abroad for twenty years, that debt shall be discharged by his sons or grandsons, but not by remoter descendants against their will.

"Twenty years" are connected *in the sentence* with absence in a foreign country. "Not by remoter descendants;" not beyond the third generation *inclusively:* it need not be paid by the fourth in descent, and so forth. "Against their will;" but if they wish well to a great grandfather or other remoter ancestor, the debts even of such ancestors should be paid by the fourth in descent, and so forth. The *Retnácara.*

Civil and natural death being in effect equal, a lapse of time cannot properly be required; therefore the commentator says, the construction refers twenty years to the case of absence in a foreign country. "If they wish well to an ancestor;" since the non-payment of a debt is declared a crime in the third degree, by a text of MENU,† (53) the great grandfather suffers

(52) It is nowhere expressly stated that the debt should be paid by the son in the life time of his father, who is insolvent. It is, however, declared that he shall pay the debt of a father, who is oppressed by calamity, such as incurable disease, &c., and that, even though no patrimony come into his hands. But, according to the remark of SIR WILLIAM JONES in the Note, the obligation is moral and religious, and not civil.—So in *Pranvullubh Gokul* v. *Deokristn Tooljaram* (Sel. Rep. 4,) it was held that when a Hindu died in gaol, where he had been confined in execution of a decree for debt, his son, adopted by another person, was not liable for his debts, as an adopted son is not answerable for any debts left by his own father.—1, MOR., Dig: Tit: "Adoption," case 100.—EDITOR.

* Without which, the son and grandson are under a moral and religious, not a civil, obligation to pay the debt, if they can; but assets may be followed in the hands of any representative. Note by SIR WILLIAM JONES.

† See MENU, Chapter xi, v. 66.

(53) The offences referred to under the head of "crimes in the third degree," are enumerated by MENU *(l. c.)* in the order following:—

Neglecting to keep up the consecrated fire, stealing any valuable things besides gold, non-payment of the three debts, application to the books of a false religion, and excessive attention to music and dancing, stealing grain, base metals, or cattle, familiarity by the twiceborn with women, who have drunk inebriating liquor, killing without malice, a woman, a *Sudra,* a *Vaisya,* or a *Kchatrya,* and denying a future state of rewards and punishments, are all crimes in the third degree, but higher or lower according to circumstances.—EDITOR.

torment in a region of horror if his debt remain undischarged; to prevent that, is a benefit to the great grandfather; when they wish this benefit to him, they must pay the debt. In like manner, the debt contracted even by a son or other descendant may be discharged by the parent if he be willing.

That which affords no gain or permanence of capital, is not a debt;* and if this be not repaid by any person, it is *consequently* no debt: how then can torment in a region of horror be the consequence of its remaining undischarged? It should not be objected, that the text must therefore be unmeaning, since the law only suggests torment in a region of horror, should the debt be not discharged by those whom the law declares indispensably bound to pay the debt. This argument is ill-founded, since the great grandfather was himself bound for the indispensable payment of the debt, and the word expressive of cause, in the definition of debt (2), there signifies a circumstance only, *not an efficient cause.*

If the father die, his debts must be paid by his sons, as above-mentioned: this NÁREDA declares with special distinctions.

169.

NÁREDA:—A father being dead, his sons, whether after partition or or before it, shall discharge his debt in proportion to their shares; or that son alone who has taken the burden upon himself.(54)

"Being dead;" having deceased, or having retired from wordly affairs: this also suggests long absence, as expressly stated in the rule of VISHNU (168). "In proportion to their shares;" whether after partition or before it: such is the meaning.

Consequently, after partition, sons must discharge the debt at its full term, whether known or unknown when partition was made, in proportion to their shares. But if they be undivided, they shall pay it out of the common property. However, if the eldest brother, or any other brother skilful in business, superintend the affairs of the family like a father, he must discharge the paternal debt out of the common stock. In effect, there is no difference in the two cases. This distinction may nevertheless be understood; by the first part *of the text* it is suggested, that if all the brothers be similarly circumstanced, all, or any one of them as substitute for the rest, may be impleaded; but if any one brother have taken the burden upon himself, he alone is impleadable.

Or the phrase, "that son alone who has taken the burden upon himself," may be thus expounded; when the other sons reside at various places, and one son occupies his father's abode, and enjoys his father's property, he alone bears the burden, namely the load *formerly* borne by his father, and therefore he must also pay his father's debts: for MISRA says, 'when any one of the sons is installed in the place of his father, he alone *must pay the debt;*' and *he must pay it,* because he has taken the heritage. So must two or more *brothers,* who have taken the burden upon themselves; for the term "that son," *though* expressed in the singular number, must be taken indefinitely.

* See the definition of Loan or Debt at v. 2.

(54) Intho *Vivada Chintameni,* this text is erroneously attributed to VRIHASPATI.—EDITOR.

Again; if any one of the sons declare, "I will neither receive *my share* of my father's property, nor pay his debts," and the others assent to that *arrangement*; in that case, those only who have accepted the father's estate, with his debts, shall dischare the debts of their father. This also is intended by the expression, "that son alone who has taken the burden upon himself." Or the expression, "whether after partition or before it," may be explained, 'whether separated from their father or not separated;' and the particle may be taken in a determinate sense. If there be undivided sons, they alone must discharge the debt; or, on failure of them, the divided sons. This interpretation should be admitted.

170.

YÁJNYAWALCYA:—The father being gone to a foreign country, or deceased *naturally or civilly*, or wholly immersed in vices, the sons, or their sons, must pay the debt; but, if disputed, it must be proved by witnesses.

"Being gone to a foreign country;" having gone to a distant abode in a foreign country, and not returning within twenty years: for it coincides with the rule of VISHNU (168), and the text which will be cited from NÁREDA (175). Seclusion from the world, *or civil death*, must also be understood. "Deceased;" meaning natural demise.

"Wholly immersed in vices;" the term (*vyasana*) is explained by lexicographers, 'danger, disease, or calamity; falling low, vice originating in lust or wrath.'* Consequently, the father being involved in distress, that is, being afflicted with a hopeless distemper, or long confined in fetters by the king in consequence of the offence of another; or fallen from his class, as a degraded person or the like, and excluded from the patrimony; or immersed in vices originating from *irregular* desires, (whether avarice, lust, or any impulse of the mind,) such as gaming or the like, and love of harlots; or immersed in vices originating from a wrathful temper, or governed by pride; *in all these cases the son must pay the debt.* For instance; the father, behaving with insolent pride, says, "I will not pay the debt, the creditor may take what measures he pleases; in such a case, the son should pay the debt, lest he fail in duty to his father, out of any possible funds, either the paternal wealth or other property: but on failure of sons, the debt should be discharged by the son's son. However, the debt may be paid by the son's son without interest, as abovementioned: the case is the same. CHANDÉSWARA has briefly said, should the father be unable to pay the debt, it must be discharged by his son, or, on failure of sons, by his grandson.

The son does not know that his father had contracted a debt from that man; or he knows it, but conceals his knowledge; in these cases "it must be declared by witnesses:" it must be established by the evidence of witnesses. But on the reading approved by MISRA, (*sácshi bhávitam* instead of *sácshi bháshitam,*) the *literal* sense is, "proved by witnesses."

The father, who contracted the debt, being absent, or dead, or addicted to gaming, to *frequentation of harlots and* the like, or (under *the suggestion of* the particle "or" *taken in a large sense*) afflicted with an incurable dis-

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* AMERA SINHA, on words with many senses.

temper or the like, or degraded, his debts must be paid by his son, or, on failure of him, by his son's son; but, if disputed, the debt must be proved by oral or other *sufficient* testimony. *The Dípacalicá.*

The word "witnesses," standing in the text, is supposed in the *Dípacalicá* to intend also written evidence and the like. Here the debt has remained undischarged in consequence of degradation, because the degraded person held not the patrimony; not because he is *equally* incapable of paying debts as of performing religious rites. It must be paid by his son, to rescue him from a region of torment. But, according to RAGHUNANDANA and others, an outcaste is only incapable of property so long as he be averse from the *necessary* penance.

Must a debt, contracted by a man who has no assets, be paid after his death by his son or grandson? On this question it is said, even in such a case the debt contracted by him ought to be paid by his son, or, on failure of sons, by the grandson; for, commenting on the following text, it is said in the *Dípacalicá*, the son, who is capable of inheriting the estate, not being blind nor otherwise disqualified, but who has not received assets left by the father, *is meant;* not one who has taken the father's estate, for he is suggested by the expression "who has received the estate:" and it is mentioned in the *Mitácshará*, that the son or grandson may be compelled to pay the debt, even if no assets have been received: and it is stated in the *Retnácara*, that a son capable of inheriting the paternal estate, not being blind or otherwise disqualified, is here designed; not one who has received assets left by the father, for he is suggested by the expression "who has received the estate."

171.

YÁJNYAWALCYA:—He who has received the estate of a proprietor leaving no son *capable of business*, must pay the debts *of the estate*, or, on failure of him, the person who takes the wife *of the deceased;* but not the son whose *father's* assets are held by another.

The order in which persons are liable for debts, is therefore as follows: in the first place the debtor himself; on failure of him, his son competent *to inherit and manage the estate;* on failure of such, the son's son; if there be no *such grandson*, the great grandson, wife, uncle, or other heir, who has succeeded to the estate, or the brother or other guardian of it: should there be no such person, he who has taken the widow; if there be none such, a son incompetent *to inherit or to manage the estate.* So the *Chintámeni*, *Retnácara*, *Dípacalicá*, and the rest. However, the obligation on an *incompetent* grandson to pay the debt is not noticed in those works under this head. This point shall be discussed. On failure of him, the great grandson, or remoter descendant, who has not received property left by his ancestor, may pay the debt if he be willing, but not otherwise. Such is our opinion. It should be affirmed, since it is positively said in the *Dípacalicá*, 'uncles and other kinsmen, capable of taking the heritage of one who leaves no issue, *must pay the debt.*'

That the debtor is bound to pay the debt, appears from many texts (166,2, &c.) that on failure of him, his son, if competent, *must pay the debt, appears* from the latter part of the text quoted (166,2), *and from ther texts;* on failure of him, the son's son if competent (170); on failure

of him, the great grandson or other representative who has received assets (171). And the text of YÁJNYAWALCYA just cited is thus explained: of a debtor who leaves no competent son, but had assets for the payment of his debts, he who succeeds to the estate must pay the debts: on failure of him, the person who has taken the widow; and not, if either of those be *amenable*, a son, while the assets are held by another, or when the assets left by his father have been transferred from him to another. How can the assets be held by another, notwithstanding the existence of a son? The son may be disqualified, having been born blind, deaf, or the like; or he may be incompetent by reason of disease, minority, or the like: and the author of the *Mitácshará* remarks, that the assets may be held by another notwithstanding the existence of a vicious son. (Book V, v. 316).

The text is read, *putrô nányáśritadravyah*, not the son whose *father's* assets are held by another, instead of *putrô nanyáśritadravyah*, the son whose *father's* assets are not held by any other; if the assets be held by another, although the son be living, that son is not liable for the payment of his father's debts. It is stated in the *Retnácara*, that this *part of the sentence* is connected with the phrase "must pay the debt;" the construction therefore is, the son shall not be compelled to pay the debt while the assets are held by another. Such is the intention of that gloss.

If no person have taken the widow, the incompetent son must pay the debt.

172.

NÁREDA:—Of the successor to the estate, the guardian of the widow, and the son *not competent to the management of affairs*, he who takes the assets becomes liable for the debts; the son, *though incompetent, must pay the debt*, if there be no guardian of the widow, nor a successor to the estate, and the person who took the widow, if there be no successor to the estate, nor *competent* son.

This text may be thus interpreted: whoever takes the assets, whether he be *the regular* successor to the estate, guardian of the wife, or son *of the deceased*, but incompetent *to the management of affairs*, is successor to the estate, and must pay the debts. It is so expounded in the *Retnácara* and other works. Its object has been already stated: "If there be no guardian of the widow, &c.;" if no person have the care of the widow or of the estate; if none take the widow or the estate; the son, that is, the incompetent son, must pay the debt. This, however, intends only a case where he may be justly liable, namely a case of incompetency arising from minority or the like; for no one has said, that a son *born* blind, or otherwise *excluded from* inheritance, shall pay the debts. "And the guardian of the widow;" should there be no successor to the estate, nor competent son, the guardian of the widow is liable for the debts. The object of this has also been already explained.

We hold that great grandsons are *only* liable for the payment of debts, *if willing to pay them;* under the rule of VISHNU (168). According to the *Dípacalicá*, they may be liable for the debts, under the text of YÁJ-

NYAWALCYA (171). Still, however, that portion of the text of YÁJNYAWALCYA, which is there adduced, must be restricted to the case of *a* consenting *descendant ;* for it has the same import with the rule of VISHNU (168).

Should a man leave both a competent son and a successor to his estate, by whom shall his debt be paid? Let it not be answered, if a competent son be living, there can be no other successor to the estate. If that son live in the house of his maternal grandfather, in consequence of the partiality of that grandsire, or in consequence of the grandsire's being childless; and the father live as a coparcener with his *own* brothers and the rest; when the father dies, that son may possibly not take the trouble of obtaining his heritage. Or, a sister lives in his father's house; and his son, through natural affection, has not taken the estate. In such cases there may be another successor to the estate, although a son be *left*. Nor should it be objected that in such a case the competent son is first liable for the debts, as already propounded. It would be unreasonable that the successor to the estate should not be first liable for the debts. That whole argument is wrong; for CÁTYÁYANA declares the successor to the estate liable for the debts, only in the case where the son is incompetent.

173.

CÁTYÁYANA:—The judge shall compel a son to pay the debt of his father, provided he be involved in no distress, be capable of property, and liable to bear the burden; but in no other case shall he compel the son to pay his father's debt.

2.—If the son be afflicted with disease, or under *the* age *fit for business*, and *another* person be found to have taken the assets, the judge must enforce payment from him; or, on failure of such persons, from one who has taken the widow.

Not driven to a foreign country by the oppression of the king or the like, is implied in the phrase "involved in no distress." "Capable of property;" not born blind, deaf, or the like. "Liable to bear the burden;" not a minor or the like. If there be such a son, him the judge shall compel to pay the debt. But if the son be afflicted with disease, or be an infant; or if he be involved in distress, or blind from his birth, and so forth; and if another person be found to have received the assets, from that person alone shall the judge enforce payment; if there be none such, from the person who has taken the widow. Such is the sense of the text. Here "afflicted with disease" is merely an instance. Therefore, should a man die childless, the same rule should be adduced.

174.

VRÍHASPATI:—The successor to the estate is liable for the debt, if the son be involved in distress; but the person who takes the widow shall be liable for the debt, on failure of successors to the estate.

The sense of the text is obvious. Let it not be objected,* as inconsistent with reason, that on this construction one would take the assets of the deceased, and another pay his debts. Inconsistency with reason may not be objected to that in which Sages and Authors concur. In fact, when there is a competent son, no other can be *the legal* successor to the estate. In the case stated, why does he not obtain his own father's estate from his uncle and coparcener? If he voluntarily yield it to his uncle, that uncle is not the successor to the estate *of the deceased*, but the occupant of property given by the son. It is the same in the supposed case of a sister. Consequently there is no occasion for a special text on this point; the son must pay the debts, in consequence of his own voluntary act. But if the uncles or the rest forcibly withhold the assets, the king shall compel the delivery. If, through any accident, that cannot be done, he must enforce payment from the uncle and the rest; for the assets of the father make *the holder of them* liable for the payment of his debts.

Consequently the intention of the texts of YÁJNYAWALCYA and the rest is this: after the decease of the debtor, if he left no assets, or if there be assets which have devolved on the son, the debt must in either case be paid by the son, agreeably to the order of payment propounded by NÁREDA (169). If there be no son, it must be paid by the son's son: and here also the order of payment propounded by NÁREDA must be assumed from parity of reasoning. If there be neither a son nor a son's son, or if there be a son or grandson, to whom the assets have not descended, but are held by some other person, the debt must be paid by him who has received the assets; on failure of such, by him who has taken the widow; or, on failure of him, by the son or grandson, who was competent to take the heritage. But an incompetent grandson is not liable for the payment of debts, any more than an incompetent son.

The text of YÁJNYAWALCYA is read *putró'nanyáśritadravyah*, the son whose *father's* assets are not held by another: and that reading is approved by MISRA and VIJNYÁNÉSWARA. Under the expression, "whose *father's* assets are not held by another," may be understood one who has taken his father's assets, as well as one whose father had no assets. The difference between the two interpretations consists in this: if a son, through generosity or the like, do not exact his father's property from his uncles and the rest, he must pay the debt *according to one opinion*, and need not pay *it according to the other*, as is evident. The preferable interpretation may be determined by the wife; but ultimately one only can be admitted.

Or, if a solvent person contract a debt and die, and his son be a minor, or be gone to a foreign country, and his uncle or other *kinsman*, or some stranger, through tenderness for that son, take care of the estate, such person alone may be understood from the expressions, "he who has received the estate of a proprietor," "the successor to the estate," and "a person who has taken the assets." As the guardian recovers money due from others to the estate, so must he pay the debts out of the estate. But if there be no assets, or if no such person take care of the estate, the person who has taken the widow must discharge the debt. If no widow be left, or if a widow survive but no person take *the guardianship of* her, the son, or the son's son in order, should pay the debt, acquiring funds by any practicable means. If there be neither son nor grandson, and if no person take the widow, or if

* The author resumes the argument interrupted by the quotation of the texts 173 and 174.

no widow survive, and if the great grandson or remoter descendant, or the brother or other *collateral relation*, take the property left by the deceased, he should discharge the debt. Such is the sense of the text of YÁJNYAWALCYA. Accordingly it is said in the *Dípacalicá*, the uncles or other *collateral heirs* of the deceased who leaves property. This should be admitted as *an* accurate *interpretation*. Both are suggested by the ambiguous terms of the texts.

All authors concur in opinion, that a son, being blind or deaf from his birth or the like, shall on no account be liable for the payment of debts. But, according to the *Dípacalicá*, the debt should be paid by an incompetent son, if no person have taken the widow. The word "incompetent" intends such disqualification, as is stated by CÁTYÁYANA, disease and the like (173). But the author of the *Mitácshará* states two cases: a son, grandson, or any other person, who has taken the assets, must discharge the debt; on failure of such, he who has taken the widow; on failure of him, any son not *born* blind or the like; and on failure of him, the great grandson or other representative who takes the heritage: they are again mentioned to show the positive obligation of paying debts then only when they have received assets. Or the person who takes the widow, that is, who takes a widow falling under the fourth description of women wilfully libidinous, or the first of twice married women,* becomes liable to the payment of debts on failure of successors to the estate; if there be no such person, the son who would have been competent to receive the heritage, not being blind *from his birth* or the like; on failure of him, any person who has taken the widow *must pay the debt*, under the text of NÁREDA (222).

These rules of decision shall be successively discussed. In the first place, if the father die, or reside abroad or the like, the competent son is liable for the payment of his debts. Natural decease, and *civil demise or* retirement in the order of devotion, are similar. Concerning absence in a foreign country, the rule of VISHNU above cited (168) propounds a distinction.

175.

NÁREDA:—The father, or, *if the family be undivided*, the uncle, or the elder brother, having travelled to a foreign country, the son shall not be forced to discharge the debt until twenty years have elapsed.

Here *the mention of* "uncle or elder brother" intends the payment of debts contracted by them; and that must be understood in the order abovementioned, when there is any sufficient cause, such as the uncle or brother leaving no son. Its further application will be mentioned. The particle "or," repeated in the text, is indefinite, comprehending all persons holding assets of the debtor.

176.

CÁTYÁYANA:—If the father be at home, but afflicted with a chronick disorder, *though not without hope of recovery*, or live in a foreign land, *but expected in time to return*, his debt shall be paid by his sons after a lapse of twenty years.

* V. 220 and Book IV, v. 158, 2 & 8.

"Twenty years;" after a lapse of twenty years, for the text coincides with that of NÁREDA (175). And this must be understood when the cure of the disease is possible, or when the return of the absent *parent* may be expected. But, when the distemper is deemed incurable, or the return of the absent parent is impracticable, the son shall pay the debt of his father, though living, as if he were dead. The creditor need not wait twenty years. The *Retnácara*.

Or *the expression used* in the text, "if the father be at home," *may signify*, if he be living; that is, if it be ascertained that he is alive. Hence, if no intelligence be received, during twelve years, concerning any man who has travelled to a foreign country, the law requires his son to perform obsequies and the like, presuming his debt; if the son did not then pay the debt until twenty years had elapsed, that would be inconsistent with common sense, and with the reason of the law. The *following* text of CÁTYÁYANA is authority for this position.

177.

CÁTYÁYANA:—A creditor may enforce payment of such debts from the sons of his debtors, who, though alive, are incurably diseased, mad, or extremely aged, or have been very long in a foreign country, *provided their sons have assets of the debtor.*

Both "diseased" and "mad" are here mentioned by the same rule by which two names for kine are used, the one in a generick sense, the other in a particular sense; or to include insanity or intoxication arising from the use of drugs or the like. "Extremely aged;" incapacitated by old age for *the management of* affairs. "Very long in a foreign country," and not expected to return. "Such," or of this kind; an epithet of debt intended to exclude debts contracted for spirituous liquors and the like. This will be subsequently explained. Here, from the concurrence of the preceding text (176) it appears, that the creditor need not wait twenty years; for the expression "very long in a foreign country" would be superfluous, the sense would be the same with the preceding text, and there would be a needless repetition.

178.

VRĬHASPATI:—A debt of the father being proved, it must be discharged by his sons, even in his life-time, if he were blind *or deaf* from his birth, or be degraded, insane, or afflicted with a phthisis or leprosy, or other hopeless disorder.

"Blind from his birth;" born blind: for the word *játi* signifies both class and birth. "Degraded" must be understood of one who is averse from *the necessary* penance. "Phthisis, or leprosy, or other disorder;" this is illustrative of any incurable disease. The *Retnácara*.

"Phthisis," or marasmus: when a father has been twenty years afflicted with any disease whatsoever, his debt must be discharged by his son; the amplified gloss "phthisis, leprosy, or other incurable or hopeless disorder," would therefore be unmeaning; hence the interpretation suggested in the *Retnácara*, that, in the case of phthisis or the like, the creditor need

not wait twenty years, should be admitted. VÁCHESPATI MISRA and others concur in this exposition. But the *Párijáta* and MISRA add, if the father, through indigence, be *wholly* unable to discharge the debt, it must be paid, even though the family be divided, by his son who is able to discharge it, or, on failure of him, it is reasonable *that it should be paid* by his grandson so circumstanced. Since the father, being born blind, was incapable of inheriting his own father's estate, and is unable to acquire property himself, he may be considered almost *literally* as moneyless.

"Even though the family be divided;" even though his father be separated: *the debt must be paid* by a son whose father is separated from his own brothers and the rest. Or it may be explained, 'by a son who is separated from his uncles and the rest;' for no distinction is expressed.

The first case shall be now considered.

179.

VRÍHASPATI:—A son born before partition has no claim on the paternal estate, nor a son born after it on the portion of his brother, whether in respect of property or debts; nor have they any claims on each other, except to purification and an oblation of water, *if either of them die.**

A son born before partition has no concern with the debts contracted, or property acquired, by his father after partition; he is incapable of taking the estate and paying the debts: and the son born after partition has no concern with the portion of his brothers; *that is,* with the debts undertaken by his brothers, and the property received by them on partition. But all are qualified for purification and oblations of water. By this text, so explained, it is cursorily intimated that a son need not pay a debt contracted after partition. Still, however, if the father be unable to discharge the debt, and there be no son in coparcenary *with him* able to discharge it, that debt must be paid by *another* son who is able to discharge it, even though he be separated from the family (169). But if there be no son amenable *for the debt,* it must be paid, even though the family be divided, by a grandson who is competent *to the inheritance and management of the estate.* Although the text of YÁJNYAWALCYA, which directs generally that the debt should be discharged by the son or by the son's son (170), may be expounded as relating to a grandson not separated from his coheirs, still, if either the son or grandson, who are thus placed on a similar footing, may be liable for the debts even after partition, is it not reasonable to affirm the same in respect of the other? That is actually expressed in the *Párijáta;* "it is reasonable," &c., and that part of the sentence relates to the grandson. Thus may the law be concisely expounded.

Should the father die, or enter into an order of devotion, or be long absent in a foreign country whence his return cannot be expected, or be afflicted with a hopeless disorder, or be blind from his birth, the debt must be immediately discharged by his son competent *to inherit and manage the estate;* but if he be long absent in a foreign land, whence his return may be expected and so forth, it must be paid after the lapse of twenty years. If the father, having been born blind, was excluded from the patrimony, and the son be capable of inheritance and be not separated from his father, it must be

* Book V.

paid by that son out of his own property. But if such a father were nevertheless able to acquire property, it must be then paid out of the property acquired by him : this is demonstrably true. If there be two sons both able to discharge the debts, and one be not separated, and the other be separated, it must be paid by that son only who is able to discharge the debts and lives in coparcenary (179). It is the same in the case of re-union *after separation*, by parity of reasoning. But if the son, who lives in coparcenary, be unable to pay the debt, or if there be none such, the debt must be paid by the son able to discharge it, even though he be separated from the family ; on failure of him, by all the grandsons in the male line, who are able to discharge it, not singly by the son of him who was born after partition. But, should the debtor have assets, then, while he lives, it must be paid by his son or grandson out of his property only ; after his death, his effects descend, on failure of sons born after partition, to the other sons, or to all the grandsons of the male line whose fathers are deceased ; his debt must therefore be paid by them out of his assets. In that case, since they have received assets, there is no difference between a son and a grandson. It is the same also in respect of the great grandson. On failure *of lineal male descendants* within the degree of great grandson, the heritage devolves on the widow and so forth ; and the debts must also be paid by the widow or other heir in *the* order *of succession*. But if there be no assets, the debt should in the first place be discharged by the son out of his own property, or, on failure of him, by all the grandsons of the male line ; the great grandsons are under no necessity of paying the debt, as has been already noticed.

But, if there be a son born after partition, and the father die, and the sons with whom partition was made survive, but the son born after partition die leaving male issue ; since he who was born after partition was alone entitled to the heritage of his parent, his son can alone claim the assets ; not the sons born before partition, nor their offspring : hence the debt shall not be discharged by them, but shall be paid in succession, or jointly, by the son born after partition and by his son, whether they have or have not assets of the debtor. Yet, should they be unable to discharge the debt, *the rule of payment* must be understood as before.

But, should a son separated from his father make a partition with his own sons of the property acquired by himself, and, bringing the remainder of his estate, live re-united with his father, and other sons be born to him ; should his father die, and afterwards he also decease, his sons, as well those born before as those born after partition, shall equally share the property, and pay the debts of their grandfather ; but the sons born after partition shall alone take the property, and pay the debts of their father. Thus may the law be concisely stated. This method should be followed in all cases ; the subject will be fully considered under the title of Inheritance.

Since the text of YÁJNYAWALCYA (170) does not express *that the debt shall be paid* in succession *by the sons or by their sons*, may it not be well asserted that the debt must be discharged jointly by sons and grandsons ? No ; for VRĬHASPATI, ordaining that the debt shall be paid without interest by a grandson, shows a less obligation on the grandson than on the son ; it is therefore incongruous to affirm, *that debts should be paid* jointly with the grandsons. Accordingly the *Mitácshara* expresses, on failure of the father, the son *shall pay his debt ;* on failure of sons, the grandson.

But the author of the *Smritisára* adds, a debt contracted after partition by the father or kinsman on his own sole account, must be paid by his son and the rest, if he be *long* absent in a foreign land: in this case only is the period *of twenty years* prescribed; not in the case of a debt contracted for the support of an undivided family or the like, for the parceners are also concerned in such a debt. They are equally bound *with* the single parcener, by whom they are sheltered. The precept is not grounded on a latent motive: hence, when payment *is demanded,* in consequence only of the declaration *or engagement* of a single *parcener,* without any *ostensible* cause *for contracting the debt,* then only is a lapse of time required by that precept; but a debt contracted for the support of the family must be paid before *that time elapse,* as ordained by another text of YÁJNYAWALCYA.

180.

YÁJNYAWALCYA:—If one of *two or more parceners or* undivided kinsmen contract a debt for the support of his family, and either die or be very long absent abroad, the other parceners or joint-tenants shall pay it.

The creditor need not wait a specifick time; for there is no authority *for such a supposition:* the time allowed solely concerns divided kinsmen.

MISRA.

"Family" signifies all the persons entitled to maintenance. Since all *the parceners* are concerned in the debt, a lapse of time is not required: the gloss should be so interpreted from the preceding sentence. The meaning is, since all partake of the benefit arising from money borrowed by a single parcener, all are bound for the debt. "They are equally bound with the single parcener, by whom they are sheltered;" a single parcener contracting debts and so forth, supports all the persons entitled to maintenance: he is as it were their screen or umbrage, sheltering them from ardent distress. Consequently, whatever is done by him may be justly considered as the act of all; and all being legally bound for the debt, it is deemed a debt actually contracted by those among them who are forthcoming: it is therefore improper to require a lapse of time.

Must not the *literal* sense of the text be preserved, even though it be inconsistent with the reason of the law; else a sin would be committed by deviating from the precepts of Sages? This position may therefore be thus reconciled: when a sin is stated in deviating from the precepts of Ságes, that intends a precept, the grounds of which are not apparent; but this is a precept of demonstrable law, founded on reasoning: such is the notion adopted in the *Smritisára.*

"Hence, when payment *is demanded,* &c.;" payment must be made in consequence of an engagement common to all the parceners; the creditors may have lent the money to any one of them; it was not necessary that such an engagement should be expressly declared when the debt was contracted: such is the sense *of the gloss. Or that gloss may be thus interpreted:* payment must be made in consequence of one, that is a single, declaration or text of Sages, *or in other words,* a text independent of reasoning, such as the following text: even without a cause *of payment arising* from the *joint* receipt of the loan, that is, without the payer's having been concerned in the receipt of the loan, or having enjoyed *the benefit of* it, or the

like, payment must be made; so interpreted by reference to the preceding phrase. In the last case only is a lapse of time required by the texts of Sages. But a debt contracted for the support of the family, excluded from the purport of the preceding text, must be paid before the lapse of twenty years. This the commentator also notices.

"Parceners or joint tenants" (180); heirs, such as brothers and the rest. "For there is no authority, &c.;" for there is no expression in this text denoting that the creditor should wait the lapse of time, nor does the reason of the law suggest it. It should not be objected, that a period *of suspension* may be deduced from the concurrence of the text above cited (175). Since it is proved from the reason of the law that no delay should be allowed to sons and the rest living in coparcenary, there is no difficulty in restricting the text of NÁREDA to sons and others with whom partition has been made. Such is the notion adopted in the *Smritisára:* and that is proper; for, immediately after the text cited, NÁREDA thus proceeds,

181.

NÁREDA:—A debt contracted before partition by an uncle, or a brother, or a mother, for the support of the family, all the parceners or joint tenants shall discharge.*

If it were intended that an interval of suspension should also be understood in this case, the enunciation of the present text would be vain; for that sense was already conveyed by the preceding text (175). It is therefore evident, that the three texts of NÁREDA relate to distinct subjects, as follows: a father being dead, his sons shall discharge his debt (169); a debt must be paid, after the lapse of twenty years (175); a debt contracted before partition by a father or kinsman for the support of the family, must be *immediately* paid (181). This text, expressing "before partition" as well as "for the support of the family," cannot have the same import with that which prescribes a time. But the first text (169) relates to a debt contracted by the father on his own sole account; in that case only is a lapse of time required.

But, says MISRA, CHANDÉSWARA holds, that a debt contracted before partition by a father or kinsman, who travels to a foreign land whence his return may be expected, must be paid by his son or other parcener after waiting twenty years. This however has been hastily said; for, in fact, CHANDÉSWARA had declared in his own work, 'if that father were so circumstanced as to be incapable of participating *in the patrimony*, and his son be not separate in regard to property, his debt must be paid *by the son;* but if the father, though he be so circumstanced, have any several property, it shall be discharged by him alone. Yet, if the father be wholly unable, and the son be able, to discharge the debt, it shall be paid by the son.' Here the expression, "so circumstanced as to be incapable of participating *in the patrimony*," describes the father as indigent in consequence of his exclusion from the patrimony. "Not separated in regard to property" relates to the son; it signifies residing together, and partaking of the same food: the consequence is, that if the father any-how acquired wealth, it would be joint property. Such a father therefore contracts a debt for the

* See Book V, v. 371.

support of his *own* family, and travels on account of his affairs to a foreign country, but his return may be expected; in such a case must his debt be paid by his son? and must it be paid after the lapse of twenty years, or within that period? On these questions the rule formerly mentioned must be adduced; for no distinction has been stated. Consequently it shall only be paid after the lapse of twenty years.

Since no time is specified in the text of VRĬHASPATI (178), should not the debt of a man blind from his birth or the like be paid without waiting a lapse of time? However the law may be in that case, still, when a father is afflicted with a fever, or similar disorder, and his son is not separated in regard to property, it appears from parity of reasoning, that the debt shall only be paid by his son after a lapse of twenty years; without distinguishing whether it were contracted for the support of his family, or for the borrower's own use. Such appears to be CHANDÉSWARA'S notion.

On this we remark, that, although no limitation have been expressed, there is no difficulty in restricting the text (175) to debts which have been contracted on the borrower's sole account; for, as it does not express a debt contracted on his sole account, so likewise it does not express a debt contracted for the support of the family. However, even in that case it must be supposed that payment cannot be expected *from the debtor himself* within ten or fifteen days. In fact it must only then be paid when the burden devolves on the son. That virtually is the meaning.

VRĬHASPATI propounds a special rule in respect of undivided parceners.

182.

VRĬHASPATI:—A debt contracted by the father acting for his coheirs shall be all paid by the son, if the father have been long abroad; but if the father die, the son shall pay only the share of his father, and never that of another debtor.

Five brothers live together, and partake of the same food; one, acting for all, contracts a debt on his own judgment, or with the consent of all, for the support of the family, and afterwards travels to a foreign country; the other brothers are alive, and incompetent *to the management of affairs*, or they are not living; and the absent brother has, or has not, made a partition with his brethren: in such a case that debt must be paid by his son out of the common stock; on failure of that, out of his proportionate share, or, on failure of that again, out of his own *several* property.

"A debt contracted by one acting for his coheirs;" since all are equally bound for that debt: or, *it may be literally interpreted*, contracted by one *of the coheirs* serving as umbrage to screen *the others* from ardent *distress*. Payment by the son is ordained, provided the father be living; but if he die, the son shall only pay the share of his father, and not the shares of his uncles and the rest. The meaning is this: while he lives, the acts done by his son are in a manner done by the father himself; hence payment then made is on the part of the father; consequently, the debt contracted by the father alone is virtually paid by him alone, and a contribution of shares is not therefore proper in that case. But, when the father is deceased, the debt contracted by him for the support of his own brothers and the rest, should, on failure of him who actually contracted the debt, be

paid by those only for the support of whom it was contracted: this is *clearly* settled. That proportion of the debt, which was contracted by the father for the maintenance of his own immediate dependants, must be paid by his son; not the shares of the rest; he is exonerated by the Sage, because the burden had not yet devolved on the son at the time when the debt was contracted.

In the *Vivâda Chintâmeni* the text is read, *pitrarnam* the debt of his father, instead of *pitransam* the share of his father. If that reading be authentick, it may still be expounded, 'the share of the father *in the debt*.'

183.

NÁREDA:—Any one surviving parcener may be compelled to pay another's *share of a* debt contracted by joint-tenant; but, if they be dead, the son of one is not liable to pay the debt of another.

"Joint-tenants;" undivided kinsmen: and this must be understood of a case where the debt was contracted for the support of the family. If it were contracted for the borrower's sole use, the whole debt must be paid by his son alone, as is just. The reason of the law proves this; but to state it at large would unnecessarily swell the work.

But the author of the *Retnácara* thus expounds the text of VRĬHASPATI (172); a debt of the father, for which he was bound together with another jointly and severally, shall be *all* paid by the son, both the share of the father, and the share of the joint-debtor, if the father had been long abroad, *and the other joint-debtor cannot be found;* but if the father die, the son shall only pay the share of his father. The same author thus interprets the text of NÁREDA (183); any one survivor may be compelled to pay the whole debt, which was contracted by persons jointly and severally bound: but if all the joint-debtors die, their sons shall pay their proportionate shares of the debt: no one shall be liable to pay the whole. He considers both these texts as relating to a subject similar to that of partnership in commerce.

Here it should be remarked, that if one of five brothers die, but leave a son, from parity of reasoning that son may be impleaded like one of the brothers: this exposition seems reasonable to such men as we are. Here 'die' intends also civil death; for religious mendicity is similar to natural death. A degraded man, who is averse from the requisite penance, is also in effect similar to one naturally deceased.

184.

CÁTYÁYANA:—Among persons jointly and severally bound *for a debt*, whoever is found, may be compelled to pay *that debt;* the son of one *long* absent abroad, *may be compelled to pay* the whole *debt*, but the son of one deceased *need only pay* his father's share.

Of persons contracting a debt for which they are jointly and severally bound, if one alone be found, he may be compelled to pay the whole debt; or if a son, whose father has been long absent abroad, be found, he also may be compelled to pay the whole; but if a son, whose father is dead, be found, he can only be compelled to pay his father's share, and not the whole sum.

185.

VISHNU:—A debt contracted *jointly and severally* by parceners, shall be paid by any one of them who is present and amenable; and so shall the debt of the father, by *any one of* the brothers before partition; but after partition, they shall severally pay according to their shares of the inheritance.

A debt contracted by parceners, or by persons jointly and severally bound, must be paid by any one of them, who is forthcoming; and so must the debt of the father by any one of the undivided brethren, who is forthcoming; but brothers who have made a partition, shall pay their proportionate shares. The texts of CÁTYÁYANA and VISHNU are thus expounded by the author of the *Retnácara*. He considers the text of CÁTYÁYANA, and part of the text of VISHNU, as relating to a subject similar to that of partnership in commerce. The subject of partnership in commerce may be thus exemplified: four traders, severally subscribing their names to the same written instrument, with one accord contract a debt for the purpose of traffick: in like manner four priests may contract such a debt for the support of their families or the like. The commentator considers the last half of the text of VISHNU as relating to the payment of their father's debt by brothers.

Both these texts may also be expounded as relating to debts contracted by undivided brethren, like the text of NÁREDA and VRÍHASPATI. In their result both interpretations of the text are accurate. The texts of CÁTYÁYANA and VRÍHASPATI are obviously applicable to subjects similar to that of partnership in trade; for they literally express "a debt contracted under the same shade," and "among persons sheltered by the same shade." The text of VISHNU is obviously applicable to undivided brethren, since it expresses "a debt contracted by parceners."

If five brothers have the same abode, and partake of the same food; and one then contracts a debt for the support of the family, with the assent of the rest, or from his own judgment, and dies or travels to a foreign land; afterwards all *the survivors* make a partition, and by accident become poor, but are subsequently enriched by wealth which they themselves acquire: in such a case, who shall pay that debt? out of what property?

186.

MENU:—If the debtor be dead, and if the money borrowed was expended for the use of his family, it must be paid by that family, divided or undivided, out of their own estate.

"Dead" is illustrative *of civil death and the like.* "Out of their own estate;" hence, if any one of the heirs, though they be separate from each other, contract a debt for the support of persons whom all the heirs are obliged to maintain, and die, or be unable to discharge the debt, it must be paid by all the heirs. The *Retnácara.*

It is stated in this gloss, that partition had been made before the debt was contracted; there is this difference *between the gloss and the case supposed.* But in fact both are right. Accordingly CULLÚCABHATTA says, if he who

contracted the debt be dead, and the money were expended for the support of the families of all the brethren, as well divided as undivided, that debt must be paid by the divided and undivided brethren out of their own property.

If that debtor be living, he must pay the debt out of the *joint* estate of all *the brethren* ; or if it be true that they have no assets, he must pay it out of his own property. Should any one of them die leaving no son, what would follow? Since the word "share" does not occur in the text of MENU, the whole debt must be paid *by the survivors* : this is a settled rule. It appears that the whole debt shall be paid by the survivors, out of the estate of the deceased ; or, on failure of that, out of their own property. But it must not be deemed inconsistent with reason, that a debt contracted by one brother for the maintenance of divided brethren, should be paid by another brother out of his own property : for it is similar to the case where a debt contracted by one of the associated traders must be paid by another. In this case, the creditor need not wait twenty years, as has been already mentioned. It is thus declared by VRĬHASPATI and other Sages, that the son must pay the debt of his father : CÁTYÁYANA distinguishes sons.

187.

CÁTYÁYANA :—On the death of a father, *his debt* shall in no case be paid by his sons incapable from nonage of conducting their own affairs : but at their full age, *of fifteen years,* they shall pay it in proportion to their shares ; otherwise they shall dwell hereafter in a region of horror.

The father's debt must be understood. "By his sons incapable from nonage of conducting their own affairs ;" by infants unable to discharge the debt. Such in effect is the sense. Consequently, if it can be paid by any persons during minority, it must be paid even during their minority: but how could it be during infancy and total incapacity? "At their full age ;" at the age when they are able *to pay.* As a share of the father's heritage is received by a son whose father was joint-tenant with his own brothers and the rest, but who is himself separate, so must a proportionate share of his debt be paid by that son. But if his father were separate from his own brothers and the rest, or if he had no brothers, the whole debt contracted by him must be paid by the son. To explain these and similar distinctions, laws have been propounded. This text of CÁTYÁYANA is intended to show, that those whom former texts have declared liable to the payment of debts, must pay them at their full age. Consequently "father" is here illustrative of a general sense. How should a debt, though contracted by the party himself, be paid during a period of disability? But a debt contracted by his father and the rest, is still more distant.

"Otherwise," if they do not pay it at their full age, the sons and the rest shall dwell hereafter in a region of horror. It appears therefore, that sons and the rest are positively bound to pay such debts. NÁREDA declares the same necessity.

188.

NÁREDA :—Even though he be independent, a son incapable from nonage of conducting his affairs is not *immediately* liable for debts.

The same :—Father's desire male offspring, for their own sake, *reflecting*, " this son will redeem me from every debt whatsoever due to superior and inferior beings :"

2. Therefore, a son begotten by him should relinquish his own property, and assiduously redeem his father from debt, lest he fall to a region of torment.

3. If a devout man, or one who maintained a sacrificial fire, die a debtor, all the merit of his devout austerities, or of his perpetual fire, shall belong to his creditors.

Independent ;" separate. It is consequently intimated that there is no other person, such as undivided brothers and the rest, amenable for the payment of that debt. He who was neither father nor mother is deemed independent, as will be mentioned. Hence a minor son is bound to pay the debt : but in that case only a delay is allowed by NÁREDA. Such is the import of the text.

" Whatsoever" relates to the " debts due to superior and inferior beings." What is due to deities, holy sages, and progenitors, is a debt due to superior beings ; debts due to men are due to inferior beings. But HELÁYUDHA, considering this as solely relating to debts due to human beings, expounds the terms, degrading debts *due* to creditors. In the *Retnácara* it is remarked, that they are degrading by reason of the extreme sin consequent to debts undischarged.

But MISRA cites the text of CÁTYÁYANA (Book III, Chap. IV, v. 15) : it is therefore his opinion, that an independent son, or one who has neither father nor mother, and is not under the age of sixteen years, is liable for the payment of debts. It may be here noticed incidentally, that " until his sixteenth year" signifies to the *nearest* limit of his sixteenth year : consequently he is a minor until the close of his fifteenth year. The construction of the text is this : ' an adolescent is also called a minor.' But *strictly* the term *(pógenda)* is applicable only to a child under the age of ten years, agreeably to the text cited by SRÍDHARASWÁMÍ.

Infancy extends to the fifth year ; childhood is limited to the tenth : adolescence continues to the sixteenth year, when puberty *commences.**

" Under eight years," or before the commencement of his eighth year, he is an infant *(sísu)* : and he also is a minor, *but* distinguished *from an adolescent*. Another is also distinguished, called a young infant *(cumára)* to the commencement of his fifth year ; agreeably to the *same* text cited by RAGHUNANDANA, " infancy extends to the fifth year." The use of this distinction regards penance or expiation and the like. But here minority must be taken to the end of the fifteenth year ; and this must be understood of a computation by vulgar or *sávanah* time, from the day of his birth.

* A part only of the verse was here cited. The distinctions may be thus recapitulated : a minor *(bála)* is in early infancy to the end of his fourth year, and called *cumára* ; in law he is an infant to the end of his seventh year, and in this period of his life is called *s'is'u* ; he is called a boy *(pógenda)* from his fifth to the end of his ninth year ; and his adolescence as *cisóra* continues from the tenth to the end of the fifteenth year.

Afterwards he is adult or competent to affairs, as is expressly declared by CÁTYÁYANA. But a certain author has remarked, that if a youth become conversant with affairs before that age, in consequence of auspicious fortune merited in a former existence, or if a youth remain unacquainted with affairs beyond that age, through ill auspices, both these should be considered accordingly *as adult or as under age.* But Sages have mentioned an age near to which puberty may be expected.

From all this detail it appears that the son shall also dwell hereafter in a region of horror, if he do not redeem his father from debt.

189.

VRĬHASPATI:—A housekeeper shall discharge a debt contracted by his uncle, brother, son, wife, servant, pupil, or dependants, for the support of the family *during his absence.*

It is here implied, that a debt contracted even by others for the support of the family, must be discharged by the housekeeper. The *Retnácara.*

The meaning therefore is, that since the terms conclude in the plural number, which conveys the sense of "and the like," *therefore* maternal uncles, and the rest, as well as other persons, are comprehended in the text. The principle of the law may be here stated: should a son competent to affairs be at hand, a debt contracted by divided brethren or the like, unauthorized by him, is not valid: but in the case of parceners, if any one of five brothers forbids the contracting of the debt, and is able to support the family by other means, the debt contracted by another brother is due by the borrower alone, and shall not be paid by him who opposed the debt. Yet if the money *so* borrowed be used by him who opposed the debt, or by his dependant, being unable to supply sufficient funds for the support of the whole family, or of his own immediate dependants, it must be discharged by him. A little has been thus mentioned on a wide subject. In fact the whole relates to fraudulent practice. Yet if he who resisted the debt, maintain his dependants out of the money borrowed against his consent without any fraudulent practice, he must nevertheless discharge the debt.

190.

MENU:—Should even a slave make a contract *in the name of his absent master* for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it.

"A slave;" an emancipated servant and the like. "That master," literally the senior, but here signifying his lord. The *Retnácara.*

By the term used (*jyáyas*) is signified best, as well as eldest; but here, metaphorically, the master. This is expressed in the gloss, "but here signifying his lord." In fact, he is best, or pre-eminent, since he supports the family.

191.

NÁREDA:—Whatever debt has been contracted for the use of the family by a pupil, an apprentice, a slave, a wife, or an agent, must be paid by the head of the family.

"An agent;" one who acts *in his service.* "A debt;" money taken up *on loan.* The *Retnácara.*

"A pupil;" one who learns texts of scripture. "An apprentice;" a student *in general.* "A slave;" born in the house of his master or the like. "An agent;" a hired servant or other person who has engaged in service for a day, a month, or the like. By this text it is declared, that a debt contracted for the behoof of the family, by any person whomsoever connected with that family, is valid.

192.

VISHNU:—*A debt of which payment has been* previously promised, or *which was* contracted by any person for the behoof of the family, must be paid by the housekeeper.

"A debt" must be here supplied. A debt, even though contracted for the purposes of traffic, but of which payment has been promised by the housekeeper, must be paid by him; but a debt contracted for the benefit of the family by any person whomsoever shall be paid by the housekeeper. Such is the exposition of the *Retnácara.* "Promised" here signifies "of which payment has been promised."

193.

CÁTYÁYANA:—What has been borrowed for the benefit of the family, or during distress, (while *the principal* was disabled, seized *by the king,* or afflicted with disease,) or in consequence of a foreign invasion.

2. Or for the nuptials of his daughter, or for funeral rites; all such debts contracted by *one of* the family, must be discharged by the chief *of that family.*

"Chief" is in the sixth case with an active sense. It must therefore be discharged "by the chief" *of that family.*

The *Retnácara*, RAGHUNANDANA, and others.

"Disabled;" happening to be then incapable of earning wealth. "Seized, or afflicted with sickness," (*grĭhīta-vyádhité*); "seized," that is, seized by the king; the terms "seized" and "diseased," are joined in apposition: the sense therefore is, while the principal is confined by the king for some offence, or is afflicted with disease. Or the apposition may be in the form named *carmadháraya*, the first term being *grĭhī* housekeeper, and the last term *itah* gone, as in the example, 'having bathed and being smeared *with sanders wood*;' or in the same form of composition, but resolvable into this sense, "and that housekeeper be gone," that is, be absent. By the import of the word housekeeper, the religious anchoret is excluded; for an anchoret does not return to his house. Since he could not discharge a debt, the term taken generally would be unmeaning; therefore it is limited by the annexed term, housekeeper.

Or the text may be read *grĭhita-vyàdhicè*, contracting a disease; an apposition in the form called *bahuòrihi*, instanced in the expression "a monkey ascending a tree." Should the principal be so circumstanced, a debt contracted by any person connected with him, (the text must be so supplied,) is *a debt* contracted during distress. All such debts must be paid by the

chief of the family: this construction will be suggested by the subsequent verse. A debt may also be contracted by a person unconnected with him, employed by one who is connected with him: such is the practice.

"In consequence of a foreign invasion;" a debt contracted for the purpose of expatriating by one who absconds through fear of a foreign prince, is *a debt* contracted during distress. "For funeral rites;" for the obsequies of a parent or the like.

Consequently, the chief of the family being disabled, a debt contracted by any person connected with him, for the support of that family, for guarding against the violence of a king, for the cure of a distemper, and (if *grĭhíta* be expounded absent householder) for defraying the travelling charges of one who wishes to expatriate with the view of acquiring wealth, for relief from a general calamity, for the celebration of a daughter's nuptials, or for the performance of obsequies for a parent or the like, must be paid by that chief of the family. Such is the sense. It is illustrative of a general meaning, and intends any debt contracted for the accomplishment of some business, which being omitted even in consequence of poverty, sin or calamity must ensue.

Grĭhítam vyádhitê is a reading found in some places, particularly in the *Dáyatatwa*: the sense is obvious; "*contracted during sickness.*"

The principle of the law should be noticed: in the case of a daughter's nuptials, for so much expense only as preserves from infraction the usage of the principal's family, may another contract debts; not for the celebration of splendid nuptials: the whole of what is borrowed for unauthorized expenses, must be paid by the borrower; but expenses which are suitable to the usage of his family must necessarily be admitted by a master able to discharge them. Consequently, should he be seized with a distemper, or unwarily go to a foreign land, a debt may be contracted by any person connected *with him*, to defray the expenses required for such a purpose, as estimated by five persons. This may be apprehended by the wife.

Must a debt contracted for the behoof of the family, without the consent of the principal, be paid by him or not? On this point CÁTYÁYANA propounds *a text already cited* (9).

A debt contracted by a son, a slave, and the rest, even without the assent of the absent principal, for the maintenance of his family, that absent principal must discharge: this BHRĬGU approves. Such is the construction *of the text* (9). CHANDÉSWARA.

Here it should be noticed, that, in the expression "even without his assent," the word "even" connects this case with that of assent. For instance; the chief of a family intending a journey to a foreign country, thus addresses his son, servant, or the like: "the family must be maintained by thee, contracting debts, or otherwise obtaining funds; or he went abroad with such an intention *unexpressed*: in these cases his assent is declared or implied. But, if it be not so, he does not assent; still, however, the debt must be discharged by the chief of the family.

194.

NÁREDA:—A father must equally pay the debt of his son, contracted either by his own appointment, or for the support of his family, or in a time of distress.

"A time of distress;" a season of calamity. The *Retnácara.*

This shall be here discussed: when a father, afflicted with a disease, remains altogether at home; and his son, slave, or the like, contracts a debt for the support of the family, but with the knowledge of the father; must the debt be in that case paid by the father or not? It is answered, three disjunctive particles occurring in the sentence, "either by his own appointment, &c.," his own appointment and the rest are stated as three grounds of payment mutually unconnected. Consequently, since *the borrowing* for the support of the family is unconnected with the father's appointment, that debt must be discharged by the father in the case proposed. In like manner, "absent," in the preceding text (9), is illustrative of a general sense.

It might be here observed, that, if the principal, when he went abroad, or when he was himself seized by a distemper or the like, forbade the contracting of debts, but his son or the rest, slighting his commands, contract debts for the support of the family, those debts need not be paid in such cases by the father: for there can be no representative in a matter expressly forbidden by the principal: and "unforbidden" must be supplied in the texts which notice debts contracted for the support of the family. Let it not be objected that inconsistence with approved usage must follow, since a master, thus relieved from distress by money borrowed by his slave, even though forbidden by himself, would be exonerated from that debt. The money has been expended by the compassionate slave or lender, for a moral purpose. If the loan were made for the sake of accumulating wealth, why did the party lend it in breach of an express prohibition? For this fault, the loss may fall on the slave, or on the lender.

Again; if the master of the family forbid the contracting of debts by his son and the rest for the support of his family, and the son or other person, slighting that prohibition, do contract debts and support the family, still the same rule should be affirmed. It must, however, be admitted, that the chief of the family is guilty of the offence consequent on refusing support to his family. In fact, that debt should in such a case be discharged by the master of a family, who strives to observe a virtuous conduct; but the king shall not compel him to pay it. Such in effect is the sense. However, it is a great sin on the part of him who travels to a foreign country, *previously* forbidding the contracting of debts, without considering the necessary end of supporting his family. Here the fourth particle (*vá*) has a connective sense, for it is declared that the particle *vá* denotes disjunction, comparison and connection. Consequently the full meaning is, that the father ought to pay all such debts.

195.

CÁTYÁYANA:—What a man has promised, in health or in sickness, for a religious purpose, must be given; and, if he die without giving it, his son shall doubtless be compelled to deliver it.*

That concerning which a man has declared, "this sum must be paid by me to that man;" or, in other words, what a man has promised, his son shall be compelled to deliver; but, if he die after delivering it himself, it shall not be *again* paid by his son: this the Sage declares, "if he die without giving it." It is intimated, by the expression "for a religious purpose," that the son is under no necessity of delivering what has been promised to harlots or the like. The text is expounded by JÍMÚTAVÁHANA and others as relating to this subject.

* Cited in Book IV, Chapter IV, at v. 3, and there expounded as relating to gifts.

But we thus expound it: the master of the family being gone to a foreign country, or diseased, or the like, a debt contracted by his son, his servant or the like, and made known to him, must be paid by the chief of the family when he returns from that foreign country, or recovers from the disease. But if he die without paying it, the debt must be discharged by his son, or by the successor to the estate, or other person liable to the payment *of it ;* on failure of the first respectively, by the next in succession. "For a religious purpose," or from a religious motive; that is, with a view to the strict observance of duty: the construction is, he must pay it on that account; meaning, that otherwise duty is violated.

By all this detail the obligation on a son to discharge his father's debt has been propounded. The payment of a debt contracted for the support of the family has been incidentally mentioned. A distinction in regard to the payment of debts by a grandson shall be now delivered.

196.

CÁTYÁYANA :—A debt of the paternal grandfather, which is proved, or which is partly liquidated, must be discharged *by the grandson ;* but never shall a debt contracted for immoral uses, or which was contested by his father, be paid *by the grandson.*

"Proved;" established by evidence. "Which is partly liquidated;" which his father had begun to pay, but of which a balance remains due. "Contracted for immoral uses;" incurred for losses at play, for spirituous liquors or the like. Sums due for losses at play, for spirituous liquors and the like, shall be subsequently noticed. "Contested by his father;" which he disputed, averring that it was not due by him. Such a debt need not be paid by the grandson, according to the *Retnácara.*

"Or which is partly liquidated;" the particle may here bear a connective sense. It consequently connects the debt partly liquidated with that which is proved to be due. But, in fact, "partly liquidated" is mentioned as confirming the certainty in respect of the debt. Accordingly another text, cited in the *Retnácara,* omits the terms "balance of a debt liquidated."

197.

CÁTYÁYANA :—BHRÍGU ordains, that a debt devolving from the grandfather, which was proved, and acknowledged by the father, must be discharged by grandsons, if it were not contracted for immoral uses, nor *already* paid by the sons.

2. The rule shall be the same in regard to the debts of the grandfather, which have not been discharged by *other* grandsons, nor by his *own* sons: but a debt of the grandfather shall be paid by his grandsons without interest.

"Proved;" established by evidence. "Not contracted for immoral uses;" not incurred for losses at play, for spirituous liquors and so forth. "Nor *already* paid;" not *already* discharged.

A debt of his grandfather, not paid by the sons of the eldest son, nor by his own father or uncles, must be discharged by another grandson. Such

is the sense of the second verse. But a certain author proposes a reading on the second measure of this verse, *na dattam vápi tat swatah,* instead of *na dattam vápi tat sutaih ;* and expounds it, a debt of the grandfather, which has not been already paid or acquitted by the grandfather himself, nor by his sons,* the father and uncles *of the person in question,* must be discharged by the grandson. "*Swatah*" has the sense of the third case.

198.

CÁTYÁYANA :—After the death of his father, debts *of his grandfather* must be carefully discharged by the grandson; but a debt contracted by an ancestor is not recoverable from the fourth in descent.

A debt which was originally contracted by the fourth ancestor or great-grandfather, reaching his descendant, namely the great-grandson, recedes, *or is not recoverable :* the great-grandson or remoter descendant need not discharge it. Such is the *literal* sense according to the *Retnácara.* It follows, of course, that the son or grandson must discharge it.

199.

NÁREDA :—An undisputed debt of the grandfather, which has been successively due by him and his sons, but has remained undischarged by them, shall be paid by his grandsons ; but it is not recoverable from a person who is fourth *in descent from the debtor.*

"Successively due ;" due by the grandfather and father consecutively.

The *Retnácara.*

A debt contracted by the grandfather, affects him in the first place, next his son, and lastly his grandson. "Proved," which occurs in preceding texts, has been explained 'established by evidence.' In what does the proof consist ?

200.

CÁTYÁYANA :—But should a considerable sum be claimed, so much only as the creditor or claimant may prove by the evidence of witnesses, shall he recover as a just debt.

If a considerable sum be claimed ; if the claimant aver, "so much was borrowed of me by this man, or by his father, or his grandfather," and the borrower, his son, or grandson, answer *the plaint* by denying its truth, so much only as the creditor justifies by the evidence of witnesses, or proves to be due, shall he recover from the debtor ; not the whole sum which he claimed, *but does not prove.* Such is the explanation, according to the *Retnácara.* Hence, if a large sum be claimed, and part be proved and part unproved, it is not right to affirm that the whole claim is false, because it was partly false. This is declared *by the text.*

"By the evidence of witnesses ;" a mere instance of evidence in general. CHANDÉSWARA.

Since it is not specified from whom it shall be recovered, it follows, that the whole of what is proved must be paid by him, whoever he be, by whom

* We must therefore read in the first measure "*putraih*" by sons, instead of "*pautraih*" by grandsons.

such debts ought to be paid. But it must be paid without interest by a grandson, as has been already noticed. On failure of a grandson, the great-grandson, or other person who succeeds to the estate, must be understood in the regular order of succession to heritage. VÁCHESPATI MISRA here observes, that such debts only as would be payable by a son, shall be paid by another heir and the rest: but it shall be paid by these without interest; for interest has not been ordained in this case. Such only is the distinction.

What debts of the father should be paid by a son, MENU declares by excepting others (151).

" Money due by a surety;" this is restricted to sureties for appearance or for honesty. The *Retnácara.*

Consequently surety in the second verse denotes also *the surety for good behaviour.*

" Idly promised;" an unprofitable gift *promised.* The *Retnácara.*

It in effect signifies a gift promised with no view to a moral purpose.

MENU:—For religious purposes, gifts are made to priests; for the sake of fame, to musicians and actors.

" Lost at play (151);" due in consequence of gaming. It consequently signifies any debt contracted for a stake in playing with dice, or for the purchase of things used in gaming. If a fine to the king be incurred by gaming with dice, and that fine cannot be paid without contracting a debt, should the offender contract a debt for that purpose, shall it be discharged *by his son* or not? The answer is, although that debt be occasioned by gaming with dice, yet, being contracted in a time of distress, it must be discharged. " Due for spirituous liquors;" in consequence of drinking spirituous liquors; borrowed for the purpose of *buying* intoxicating liquors, and so forth.

This is restricted to money due on these accounts by persons not authorized to game or drink spirituous liquors. The *Retnácara.*

Gaming is authorized by the system of law on the festival called *Dyúta-pratipet*;(55) and the use of spirituous liquors is authorized by law on the celebration of the sacrifice named *Sautráméni*; to certain mixed classes the *constant* use of spirituous liquors is allowed by custom: a debt contracted by the father for these purposes, in such circumstances, must be paid by his son. Such is the notion suggested in the *Retnácara.*

" What remains unpaid of a fine or toll;" for instance, a fine being due to the king for some offence, if the father die after paying half the amount of that fine, the balance shall not afterwards be paid by his son. 'Nor what remains unpaid of a toll.' Toll signifies a duty of custom payable at wharfs and the like. For example: the father, having obtained indulgence on the grounds of friendship or the like, has only discharged half of the regulated customs which are paid to the king's officers by traders resorting to markets or the like on the business of traffick; returning home he happens to die: in that case, the remainder need not be paid by his son. The same term (*ṡulca*) also signifies a nuptial present given to a bride at the time of her marriage and the like.

(55) The night of the last day of the light half, and eve of the first day of the dark half of the month Kartika, which is to be spent in gambling in honour of Lakshmi, the goddess of fortune.—EDITOR.

201.

VRĬHASPATI:—The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or of wrath; or sums for which he was a surety, *except in the cases before mentioned:* or a fine, or a toll, or the balance of either.

Sums due for spirituous liquors, or losses at play, money idly promised, and the balance of a fine or toll, have been already explained. A promise made under the influence of lust, or under the influence of wrath, shall be subsequently explained. The *Retnácara.*

MISRA expounds presents idly made, presents idly promised. He conceives, that were they actually given, they must necessarily be delivered, because the property of the father is divested.

202.

GÓTAMA:—Money due by a surety, a commercial demand, a toll, the price of spirituous liquors, a loss at play, and a fine, shall not involve the sons *of the debtor.*

Debts originating in suretiship, commerce and the rest, shall not involve the sons; they shall not be paid by the sons of the debtor.

The *Retnácara.*

This appears, on a cursory view, to be the purport of the gloss: a debt incurred by becoming a surety (for instance, a man has become surety, and the debtor dying, the sum becomes due by the surety; a debt so incurred), a debt contracted for commerce, for a toll, for spirituous liquors, for a loss at play, for a fine, need not be paid by the son of the debtor; he shall only discharge a debt incurred on a moral consideration, or for an usual cause, or for the support of the family.

VÁCHESPATI MISRA expounds "sums for which he was a surety," sums due by a debtor, for whose appearance or honesty he was surety; these, and sums become due by the father in commerce or the like, shall not involve the sons. He expounds the text, sums due by a surety for the appearance or honesty of the debtor, because he thinks the son of a surety for payment must necessarily discharge the debt, under the text of MENU (150). Money due in commerce may be thus instanced: some person, making a contract with this man's father, delivered certain sums of money to him, as the price of barley or the like, on an agreement in this form, "I shall receive an advantage above the quantity which may be equivalent to the sum advanced at a price to be arbitrated by five persons:" the vender dies, after delivering to the buyer goods equivalent to the advance at the arbitrated price; the remainder need not be delivered by the son. Again: the price of spirituous liquors, the cost of dice and the like, a stake at play, a fine originally small, or the balance of a large fine, need not be paid by a son after the death of his father.

Both these opinions shall be discussed: and first, the gloss of the *Retnácara.* Since the word "debt" does not occur in the text of GÓTAMA, what should suggest "a debt contracted in consequence of suretiship?" It

would be inconsistent with the reason of the law. If the father were surety for payment, the debt, though contracted by a stranger, must be paid by his son; as is ordained in the system of jurisprudence: how can it be reasonable that the son should not in this case discharge the debt though actually contracted by his father? It is also said, that a debt contracted on a commercial account, need not be paid by the son: how can that be pertinent? Why should not the debt be paid by the son, who participates in the benefits of that traffick or is *at least* naturally competent to benefit by it? If the term (*śulca*) be explained a nuptial present instead of a toll, it has been already mentioned, that a debt, though contracted by another on this account, must be admitted by the master of the family; why should not the son admit such a debt contracted by his father? If it be explained a toll payable at a wharf or the like, that is a cause consistent with usage *and good morals*; it appears, therefore, that it ought to be paid. Why should not a debt contracted for the payment of a fine be discharged by the son? Since a man atones for his crime by paying the fine, a debt contracted to discharge a fine is contracted on a moral account. Let it not be objected, that this text, being placed under the title of Debt, positively concerns debt alone: and, since it is a rule not to strain a text, even money borrowed, or otherwise due, on account of a fine, need not be paid by a son. In his gloss on the text of MENU above cited (151), CULLÚCABHATTA says, after the death of his father, a son is not liable for the payment of a fine or toll, or the balance of either, which was demandable from his father. He does not say, that a debt contracted on account of a fine need not be paid.

203.

VYÁSA also declares:—Neither a fine, nor a toll, nor the balance due for either, shall be *necessarily* paid by the son of the debtor; nor any debt for a cause repugnant to good morals.

On this text the authors of the *Retnácara* comment: since the balance of a fine is suggested by the *general* term "a fine," and is nevertheless repeated, the sense must be, that if the amercement be great, it must be paid, but not the small arrear of such a fine; but if the amercement be small, no part of it need be paid *by the son:* consequently "fine," in this text, signifies an inconsiderable fine; and "toll," an inconsiderable toll. In like manner, since VYÁSA and MENU have noticed, under the title of Debt, fines and the like which are not debts, it is not reasonable to explain the words fine and toll, which occur in the text of GÓTAMA, as signifying debts contracted for such causes. Consequently "debt," in the gloss of the *Retnácara*, signifies *money due, or* sums similar to debts. It therefore coincides with the gloss of MISRA. Or the text of GÓTAMA may be expounded in this manner: The terms *may be connected*, and signify a commercial toll, or duties payable at wharfs and the like. "Commercial toll" may nevertheless intend nuptial presents also.

The expression in the text of VYÁSA (translated "any debt for a cause repugnant to good morals") is explained by MISRA, 'excluded from usual causes.' Consequently that debt which is contracted for some civil purpose consistent with the prescriptive usage of good men, must be paid by sons and the rest; but if it be the reverse, it need not be discharged.

In fact, the import of the expression used by VYÁSA is this: after the death of the father, a fine due by him need not be paid by his son; surely

the balance of a fine need not be paid: but if the son, erroneously paying a fine to the king, have left some part of it undischarged, and be now impleaded by any man, that fine, due by the father was not payable by the son, and therefore he shall not discharge the balance of it. Nor shall he receive back what he had paid to the king: the second term is only propounded to forbid the payment of a mere balance. The difficulties which will be noticed, may be accordingly removed.

They are as follow: among the many various fines ascending to the highest amercement, it is difficult to determine which shall be deemed considerable, which inconsiderable: and no reason appears why an inconsiderable fine should not be paid, and why a considerable fine should be paid. Again; if a very small part of the greatest fine have been paid by the father, it is agreed on all hands that his son shall not be compelled to discharge the remainder: but in another case, he must discharge the whole fine due by the father, amounting to somewhat less than that *greatest fine*; which forms a great disparity. This and other *objections may be urged*. A debt contracted for the making of a garden, pool, or the like, undertaken on religious considerations, must be considered as incurred for religious purposes. It appears that a debt contracted for the structure of a house, a garden, or the like, to be enjoyed by future generations, or for increase of wealth *by commerce*, must be paid by a son who enjoys the benefit of it, or is competent to enjoy it. Even a debt contracted for the sake of wearing delicate apparel and the like, must be paid by a son, since it has not been enumerated among debts which he need not discharge. This is right. Some, however, think that this, like money idly promised, need not be paid by the son.

Here an incidental observation may be made: when a man, unable to make immediate payment of tolls due at wharfs or the like, gives a surety to the king's officer, and both the merchant and surety afterwards die, it shall not in that case be paid by the son of the surety; for there would be great disparity in requiring from the son of the surety payment of that which need not be paid by the son of the merchant himself. Consequently, whatever must be discharged by the son of a debtor, that only need be discharged by the son of a surety for payment.

CÁTYÁYANA explains promises made under the influence of lust or of wrath.

204.

CÁTYÁYANA:—What a man has promised, with or without a writing, to give to a woman who had another husband before, let the judge consider as a debt contracted under the influence of lust:

2. But what has been promised to gratify resentment, by hurting *another*, or destroying *his* property, let the judge consider as *a debt* incurred under the influence of wrath.

Hence the rule cannot be strained. MISRA.

Consequently, when the expression, "incurred under the influence of lust," is taken in its literal sense; what is promised by a man to his own wife might be considered as a debt incurred under the influence of lust: to prevent such wrest, CÁTYÁYANA has propounded this particular explanation.

What has been promised, with or without a written engagement, to a woman who had another husband before, or, if that suffice not, what has

been borrowed and given to her, is a debt contracted under the influence of lust. The expression, "a woman who had another husband before," intends only a woman not *legally* married to the giver. The *Retnácara.*

Is not that which is promised to a woman who had another husband before, alone considered as granted under the influence of lust? why should the author add, "borrowed and given to her?" The objection is ill-founded since "debt" would be unmeaning. "Not legally married," signifies not legally married to the party himself. Consequently, whatever is promised, or borrowed *and given,* for the abduction of a woman with whom intercourse is criminal, must be considered as a debt incurred under the influence of lust.

The second verse is explained in the *Retnácara;* what is borrowed to give away for the purpose of destroying another's property, or injuring another man through resentment, is a debt incurred under the influence of wrath. Here debt must be understood to complete the similarity between engagements made under the influence of lust and of wrath. The construction therefore is, "that which has been so promised let the judge consider as a debt incurred under the influence of wrath." It was first promised, and afterwards borrowed and given. Hence, resentment being roused by mutual contention in respect of some effects, one promises them to priests, declaring, "I will give this to a priest;" not being able to give away those effects, he wishes to give the value of them, but, unable to give it out of his own property, contracts a debt; that debt might be considered as incurred under the influence of wrath. To prevent such wrest, CÁTYÁYANA has propounded this explanation.

These alone are called promises made under the influence of lust or of wrath before the debt was contracted. The *Retnácara.*

The meaning of the gloss may be thus explained: when money has been promised to an adultress, or promised to gratify resentment by injuring another or the like, it is cursorily explained, that such are promises made under the influence of lust or of wrath. Consequently, a debt contracted to fulfil such a promise, and money so promised, need not be paid by the son or other heir. But we explain "a debt contracted under the influence of lust," an obligation similar to a debt so *incurred;* the similarity consists in the contract of payment. Consequently that only which was promised for the sake of enjoying an adultress, constitutes an obligation incurred under the influence of lust. Accordingly ŚÚLAPÁNI has delivered the following comment on a text of YÁJNYAWALCYA.

205.

YÁJNYAWALCYA:—A son need not pay, in this world, money due by his father for spirituous liquors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll; nor anything idly promised.

Debts of his father incurred on account of spirituous liquors, or for the enjoyment of another's wife, or undertaken on account of gaming, for a fine, or for duties at wharfs and the like, a son need not pay. "Father" is here illustrative, suggesting also his mother. ŚÚLAPÁNI.

Here the expression, "incurred for the enjoyment of another's wife," excludes a debt contracted from a money-lender; else the author would have said, money borrowed for the sake of obtaining another's wife.

The author of the *Mitácsharú* has this gloss: a debt incurred by a drinker of spirituous liquors, or under the influence of lust for the sake of enjoying a woman, or caused by losses at play, what remains due of a fine or toll, and money idly promised, that is, promised to impostors, bards, or wrestlers; (for it is declared, "Fruitless is a present given to an impostor, a bard, a wrestler, a quack, a flatterer, a knave, a fortune-teller, a spy, or a robber;") all such debts incurred by the father, his son, or other heir, need not pay to the vintner and the rest.

It appears from the expression, "to the vintner and the rest," that the price of spirituous liquors and the like, due by the father, need not be paid by the son to the vintner and the rest. But in fact the interpretation suggested in the *Retnácara*, that even a debt contracted for such purposes need not be paid by the son, should be admitted; for the phrase, which occurs in the text of VYÁSA, "nor any debt for a cause repugnant to good morals," shows that such debts need not be discharged by the son. But MISRA has said nothing expressly on this subject.

Yet a debt contracted by a father, for the payment of a fine to the king, ought to be discharged by his son; for the last term, in the following text, is expounded dominion over the senses and a fine imposed by the king; and because a fine has a moral purpose since it expiates guilt.

206.

MENU:—By open confession, by repentance, by devotion, and by reading the scripture, a sinner may be released from his guilt; or by almsgiving, by dominion over the senses, or by a fine to the king (for the word *dama* admits both senses.)

If a fine be an atonement, even the balance of a fine ought necessarily to be paid by a son; why have Sages ordained, in contradiction to the reason of the law, that it shall not be paid? The objection is ill-founded; for the fine is cancelled by becoming a religious anchoret on the approach of death, and by other means. All authors have directed penance, not the payment of amercements, to expiate guilt, which is inferred from an actual disease to have been contracted in a former existence. Accordingly the fourth measure of the text cited (206) is in some copies read, "or by almsgiving in case of his inability *to perform the other acts of religion.*" It is, however, reasonable, that the balance of a fine should be paid by the son, if his father be absent; but, since the son is not his own master, the king cannot exact it by forcible means, or the like. This is a demonstrated inference.

In general it is settled that a debt contracted by a father shall be paid by the son with interest, or, on failure of him, by the grandson without interest: but all agree that only such debts as have not been excepted by any Sage need be paid. Therefore, a debt contracted for an immoral purpose, and money promised for such a purpose, or idly promised, or promised to the king or other person for the liquidation of a fine or the like, and so forth, need not be paid. Such is the full meaning of the law. Other debts must be paid by the successor to the estate, and the rest in order, on failure of persons first liable. But MISRA holds, that they shall be discharged without interest; he assigns as a reason, because it has not been declared in this case, as in that of a son, that interest shall be paid.

CHANDÉSWARA, ŚÚLAPÁNI, and the rest, have not expressly noticed this point. To that *inference* it may be *therefore* objected, that every Sage, who ordains the payment of debts by a grandson, declares that they shall be discharged without interest: but some Sages have directed that a debt shall be paid with interest by the son *of the debtor;* others have not noticed the question of interest: consequently, as no legislator has ordained payment with interest by successors to the estate, so none have ordained payment without interest; the rule being therefore general, what then should inhibit payment with interest? This subject has been sufficiently discussed.

207.

YÁJNYAWALCYA:—Neither shall a wife or mother *be in general compelled to* pay a debt contracted by her husband or son, nor a father *to pay* a debt contracted by his son, unless it were for the behoof of the family; nor a husband *to pay* a debt contracted by his wife.

208.

VISHNU:—Neither shall a wife or mother *be in general compelled to* pay the debt of her husband or son, nor the husband or son *to pay* the debt of his wife or mother.

209.

NÁREDA:—A debt contracted by the wife shall by no means bind the husband, unless it were *for necessaries* at a time of great distress: a man is indispensably bound to support his family.

2. A wife or mother shall not *in general* pay the debt of her husband or son.

This last hemistich is cited on the authority of MISRA.

Unless it were contracted for the support of the family at a time of great distress, a debt incurred by a wife shall not bind her husband: that is, it need not be paid by her husband. The *Retnácara.*

Both these texts of VISHNU and the other *legislator* relate to a wife of unequal class: but a wife of equal class must pay a debt contracted by them, even though experiencing no distress. Wives of unequal class are prohibited in the *Cali*-age; a text concerning the wife of equal class will be cited under the title of Inheritance. BHAVADÉVA.

This is liable to objection. Why is the general term "wife" taken in a limited sense? Since it is a rule that; "what might be supposed is excepted," what might be proposed generally in respect of any person or thing, is alone especially excepted as relating to that person or thing. For instance: it being stated generally that a father's debt shall be discharged by his son, an exception is made that a debt, contracted on account of gaming shall not be paid. But in this case there is no such supposition. Why then is an exception propounded? It is answered, that Sages have excepted these cases, apprehending the hasty supposition that payment might be required, because these persons are not unrelated to the debtor,

and are naturally competent to take his assets. For example: the text above cited (167, 2) is illustrative of a general sense, and comprehends great-grandsons, daughter's sons, and the rest. Consequently, a debt shall not in general be paid by any other than a son, or a son's son; yet it must be discharged by heirs of every description, if they have received assets. YÁJNYAWALCYA propounds an exception.

210.

YÁJNYAWALCYA:—A debt acknowledged *by her husband*, or contracted by her jointly with her husband or son, or contracted by the woman herself, must be paid by a wife *or mother;* no other debts shall a woman be compelled to pay.

"Acknowledged;" fully acknowledged. The *Dipacalicá.*

It consequently signifies a debt admitted by her husband at the point of death.

"With her husband or *son*:" the particle is connective, and includes her son also: hence, a debt contracted jointly with her husband or son, must be paid by a wife or mother. For instance: her husband and son being incompetent *to the management of affairs*, and the woman herself being very active, she contracts a debt jointly with them; such a debt is meant. Or, the husband and son being incompetent, or being unable *to act* by reason of other occupations, she uses their names, or contracts debt in her own name from a money-lender: in either of these cases the debt is contracted by the woman herself.

211.

CÁTYÁYANÁ:—A debt contracted jointly with her husband or son, or singly by the woman herself, shall be paid *by a wife or mother;* in such and in no other cases shall the debts contracted by them be paid by her.

212.

NÁREDA:—If a wife be thus addressed by her lord at the point of death, *or just before a long journey,* "such a debt must be paid by thee," she must pay it, however unwilling, if assets were left in her hands.

"Debts contracted by them;" debts contracted by her husband and son.

The *Retnácara.*

If the assets of the husband have been received by his wife, she must pay the debt, "however unwilling;" that is, even though she do not promise to pay it. But if the wife, so instructed by her husband at the point of death, in these words, "my debt must be paid by thee," do promise to discharge it, she must then pay it, even though assets were not left in her hands. Such is MISRA's opinion; and he expressly declares it: 'a debt, acknowledged by her husband, must be paid by a wife; and so must a debt be paid by a childless widow, who has accepted the care of the assets, even though

she have not accepted the burden of the debts; for she is successor to the estate.' It must be therefore understood, that the debts of her husband must be discharged by the widow, who has accepted the care of the assets, under the text of YÁJNYAWALCYA (171).

This appears also to be the opinion of CHANDÉSWARA; *for he says* in the *Retnácara*, "at the point of death" is illustrative of a general meaning. It therefore comprehends also one who intends a journey to another country, or retirement in another order. But even an instruction incidentally addressed to the wife by her husband, though not deceased or the like, requiring her to pay this debt, must be considered as given with a view to *the probability of* decease. This and other points must be considered.

213.

NÁREDA:—A childless widow must pay the debt of her sister enjoining payment; or whoever receives the assets left by that *sister*, must pay her debts.

On the death of one of two sisters left as coparceners in the house of their father, who had no male issue, the debt of that sister must be discharged by the surviving sister enjoined to pay it. Such is the sense of the first hemistich. Or any other who takes the succession must pay that debt.
The *Retnácara*.

VRĬHASPATI also directs, that a father *should* pay a debt contracted by his son.

214.

VRĬHASPATI:—A debt contracted by a son shall be paid by the father, if he promised payment; or he may pay it from affection to his son: but unless he promise, he cannot be compelled.

"If he promised payment," *or authorized the contracting of the debt;* for instance, if the father told the creditor "lend money to my son," or if he told his son "borrow money to maintain your own grandmother."

"From affection to his son:" having contracted a debt unauthorized by his father, the son dies; if his father, reflecting, "should the debt remain unpaid, my son will go to a region of horror," be disposed to discharge the debt through affection to his son, he may pay it; but otherwise he need not pay it: consequently, a debt contracted by a son need not be paid by his father, unless spontaneously, or in consequence of a promise.

215.

CÁTYÁYANA:—By the general rule of law, a father need not pay the debt of his son; but he must pay it, if, either at the time of the loan, or afterwards, he promised payment.

"Promised" here signifies stipulated at the time of receiving the loan; but promised after receiving the loan is conveyed by the expression, "subsequently agreed to," or promised afterwards. Son is here taken illustratively.
The *Retnácara*.

These terms consequently fall within the sense of the expression used in the text of VRĬHASPATI, and the texts therefore coincide. "Illustratively;"

even a debt contracted by a wife or the rest, must be paid by her husband and the rest, if he gave previous or subsequent assent, and the wife or other debtor be unable to discharge it, or die. Here the word "son" being considered as illustrative of a general sense, it may comprehend presumptive heirs of the same person, who live together, and partake of the same food.

It is reasonable that the debt of a wife should in some cases be paid by her husband.

216.

YÁJNYAWALCYA:—If the wife of a herdsman, a vintner, a dancer, a washerman, or a hunter, contract a debt, the husband shall pay it; because his livelihood chiefly depends on the labour of such a wife.

217.

VRĬHASPATI:—The husband, being a vintner, a hunter or fowler, a washer, a herdsman, a shepherd, or the like, shall pay the debt of his wife: it was contracted in the concerns of the husband.

These husbands shall be compelled to pay the debts of their wives. "Because" should be here supplied; and the construction is, because those debts were contracted by them in the concerns of their husbands. Consequently, a debt may be contracted by a wife in the concerns of her husband, if they require such a debt.

218.

NÁREDA:—Except the wife of a washer, hunter, herdsman, or vintner; for the livelihood of such a husband, and the support of his family, depend on her.

This must be connected for interpretation with the text above cited (209, 1), in this manner; a debt contracted by a wife, excepting the wife of a washer, &c., shall not be paid by her husband. The reason is subjoined: and here again "because" must be supplied; or the second particle has the causal sense.

Here "washer" and the rest are mentioned indeterminately. In fact, whatever be his class, if the husband's livelihood depend chiefly on the labour of his wife, he must discharge a debt contracted by her, whether he be a priest or a washer: but he whose livelihood does not depend on his wife, whether he be a washer or a priest, shall not pay his wife's debt. This is noticed by MISRA: *he says*, 'in other cases also, wherever the wife has the chief management, there is no restriction of class; the wife alone conducts all affairs, the husband is absolutely ignorant of every transaction.' Accordingly it is observed, that, in the province of *Cámarúpa*, almost every civil transaction is now conducted by women.

But this is merely a vague description; for a debt contracted by the wife of a *Bráhmana* and so forth, for the support of the family, must also be paid by the chief of that family. From the reason assigned, "because his livelihood chiefly depends on the labour of such a wife," it appears that any other persons, of whom the livelihood depends on the labour of their wives, must pay the debt contracted by those wives. This is admitted in the *Mitácshará*. CHANDÉSWARA also makes the same observation; 'the cir-

cumstance of his livelihood depending on the labour of his wife, is particularly intended; not any restriction of class.'

Here it should be remarked, that they are only mentioned approximately; for, the husbands being constantly occupied in washing clothes, attending cattle and the like, and therefore unable to provide necessaries for consumption; and such being the practice of certain *other* persons, the providing of necessaries, like *other* household business, is conducted by their wives alone. It is the same also in respect of husbandmen and the rest. However, a debt contracted by any married woman, who presides *over her husband's household*, for the support of her own brother's family, need not be paid by the husband, any more than the debt of a father contracted under the influence of lust; but other debts contracted by his wife must be paid by the husband.

219.

CÁTYÁYANA:—A debt which is contracted by a wife or mother for the behoof of the family, when her husband or son is gone to a foreign country, after authorizing *the loan*, must be paid by the husband or son.

If a husband or son, intending a journey to a foreign country, and being asked by his wife or mother for food and raiment, tell her, "contract debts;" the debt contracted by her must be paid by him when he returns to his own home. "After authorizing the loan" is an approximate expression; for, even though he did not authorize it, the reasoning would be the same.

The *Retnácara*.

The meaning is, if he go abroad without making provision for her food, vesture, and the like. "When he is gone to a foreign country," is also illustrative of a general sense; the same rule should be admitted even though he remain at home. As is mentioned in the *Retnácara*; 'if he remain at home, or go abroad, without assigning any subsistence to his wife or mother.' This again is merely illustrative; hence such a debt, even though contracted by a minor son or daughter, must be discharged.

Here an observation may be made: a debt contracted by a mother for religious purposes and the like, must be discharged by her son. Suppose a man whose son is an infant, and whose wife has contracted a debt jointly with her husband, but he dies, and his son inherits his property; in that case, by whom should the debt be paid? By the son alone, for he is under a double obligation to discharge the debt: *under a civil obligation*, because he holds assets; *under a moral obligation*, because he is son *of the deceased*. But, if the debtor leave no assets, what should follow? It is replied, the son nevertheless ought to pay the debt; for redemption from debt is stated as the benefit arising from male offspring alone, since the text of NÁREDA (188) describes the wish for male offspring as originating in the wish to be liberated from debt: sensual delights and male offspring are described as the benefit accruing from a wife, by a text of the *Cálicá purána*, "a wife affords delight and male offspring;" consequently, if there be a son produced by her, why should the wife, who has afforded other benefit, discharge the debt? It is accordingly remarked in the *Mitácshará*, that 'a debt contracted by a wife jointly with her husband, must, on failure of the husband, be paid by the wife, if she have no male issue.'

Thus the divine CÁLIDÁSA says in the *Raghuvanśa*, "bliss in another world, and purity in this, spring from devotion and alms; but progeny of

pure race contributes to prosperity in the other world as well as in this." And again, in the same work; "thinking oblations will be hardly obtained after me, *the manes of* my ancestors taste the water, which I regularly offer, warmed by their sighs."* Of those passages the meaning is this: in another world, prosperity or auspicious fortune, that is, the bliss of heaven, is attained; in this world, auspicious fortune, that is, the discharge of debts, is obtained: meaning debts to the deities, to progenitors, to holy sages, and to men. The second verse is a speech of a mighty king named DILÍPA, who was childless. It has this meaning: water has been presented in the form of oblations to ancestors by me DILÍPA; but my ancestors taste the water warmed by their sighs: he assigns the cause of their sighs; after me DILÍPA it will be difficult to obtain *oblations of* water: reflecting, "by whom will it be presented, since he has no son," they emit warm sighs. Therefore, wanting progeny, ancestors also sigh with sorrow. It is hereby indicated, that *the birth of* a son relieves *ancestors* from this misery.

If there be both a great-grandson who has succeeded to the estate, and a widow, what should be ruled? There is no difficulty in that case, because whoever takes the estate of the deceased, must also maintain those whom the deceased was bound to support. Since food and raiment must necessarily be furnished to the widow; from parity of reasoning, money sufficient to discharge the debts of her husband, which are payable by her, must also be supplied. But if the debtor leave no assets, his great-grandson does not succeed to any estate: the widow, however, has several property, such as jewels and the like; the debt should in that case be discharged by her out of that property, for Sages have declared her liable to the payment of debts. This and other points may be reasoned by the wife. VISHNU also declares, that debts must be paid by those who take the assets.

220.

VISHNU:—He who takes the assets of a man leaving no male issue, must pay the sum due *by him;* and *so must* he who has the care of the widow left by one who had no assets.

"Sum" (*dhana*) here signifies debt; the same term in the subsequent phrase, "who had no assets" (*adhana*), signifies wealth. The *Retnácara.*

Two sons have succeeded to the estate on the death of the father; in his life-time the father had commanded one son to pay a certain debt; what is the rule of decision in that case? Although both be equally successors and sons of the deceased, that son only who received the injunction must pay the debt; for he is bound to fulfil his father's commands. But if the other son, considering it as a moral duty, spontaneously give his proportionate share, it should be accepted: else, how could the moral obligations of that other son be fulfilled; for, he who received the injunction should fulfil his father's commands without distressing the second son. Yet, if the second son delude his brother by this declaration, "I am my father's son as well as he, I therefore will pay my proportionate share of the debt," and do not pay *his share of* the debt to the creditor, it must be fully discharged by him who received the command; for his father, dreading immoral consequences, gave the order through apprehension of such deceit or the like. If a father, in such a case, give land or similar property to any one son with such an instruction, surely the debt must be discharged by him alone; and he shall take

* The verses are only quoted in part; I insert the translation at large.

the whole property given by his father *on this consideration*, and his proportionate share of other property left by his father. The subject has been further discussed already.

On failure of persons holding assets, he who has the care of the wife must pay the debt, under the rule of VISHNU (220) and text of YÁJNYAWALCYA (171). NÁREDA declares it with a particular explanation.

221.

NÁREDA:—He who possesses the last of disloyal wives, or the first of twice married women, must pay the debt contracted by her husband.

The sense is this: of four sorts of women wilfully libidinous, or disloyal, her who is last or fourth in the enumeration; and of three twice married women, her who is first described: he who takes *either of* these two women shall pay the debt contracted by the husband, and not the debt contracted by the husband of any other woman. CHANDÉSWARA.

Consequently, he who takes a twice married woman of the second or third description, or a disloyal wife of the first, second, or third description, shall not pay the debt contracted by her husband. The *same* legislator propounds the distinctions of twice married women and disloyal wives, (Book IV, v. 158.)

If a man wed a girl whose marriage has been already celebrated but not consummated, he must pay the debt of her first husband, because he has taken in marriage a girl already espoused by another.

That girl who is tacitly or expressly contracted to one man by her parents, considering the laws of the district, or reflecting, "the laws of our country are not violated by giving the damsel to that man, though ugly;" ("laws" are in the plural number with a comprehensive sense, including the laws of families and laws in general;) if such a girl contract an affection for another man, handsome or rich, *and wilfully accede to him*, she is considered as the second twice married woman. The text (Book IV, v. 158, 3) is also read *utpannasáhesà* instead of *utpannásahesá*; this reading the author of the *Mitácshará* explains, "becoming disloyal."

If the same kinsmen, tacitly or expressly affiancing a damsel to one man, but deluded by beauty or the like, give her in marriage to another, she is considered as the third twice married woman. The distinction between the second and third arises from this difference, *that in one instance the second marriage is* the act of her kinsmen, and *in the other it is* not the act of her kinsmen. In these cases, since the first husband had not *actually* received the damsel, the debt contracted by the first husband shall not be paid by her second lord. By "parents" and "kinsmen" must be here understood her father, paternal grandfather, or other persons, who have a right to dispose of her in marriage.

Whether she have borne children, or be childless, (intimating generally one whose marriage has been consummated,) a woman who clings to another man during her husband's life, through lust, (or avarice, or any irregular appetite,) is the first disloyal wife.

Her husband being living, she, who deserts him, and gives herself to another man, saying "I am thine," but afterwards returns to her first husband, again saying "I am thine," is the second. She is distinguished from the fourth, because, in respect even of her wedded husband, she is a woman previously enjoyed by another.

After the death of her husband, a woman, living in his family, whether unguarded or guarded, who receives the caresses of another, through carnal desire, is the third disloyal wife. In fact, she is similar to the first, but distinguished by the circumstance of her husband's decease, whereas the husband of the first was living. "Leaves his brother or other kinsmen," (Book IV, v. 158, 7); that implies, that she so acted, though opposed by her husband's brother and the rest: it denotes her sinning in secret.

Or the phrase, "leaves his brother or other kinsmen," may intend the case of troth verbally plighted; and the term "brother or kinsman" may comprehend every *sapinda* of equal class. Thus, if the affianced husband of a girl, who was tacitly or verbally given in marriage, die, and she receive the embraces of a stranger, or a person not related within the degree of a *sapinda*, she is considered as the third disloyal wife; not as a twice married woman. This may be understood from the ambiguous terms of the text. But if she receive the embraces of a man of equal class on failure of *sapindas*, she is a twice married woman of the second description. For in the definition of the third twice married woman, (Book IV, v. 158, 4) the terms "*sapinda* of equal class" occur. Thus some expound the texts.

On this we remark, that, after the death of her husband, if a woman, previously authorized by him, receive the embraces of his brother for the sake of male offspring, there is no offence: hence it is specified, "through carnal desire," and, "who leaves his brother or kinsmen." If she pass by his brother or kinsman, and receive the embraces of another man of equal class, in conformity to the directions of her husband, there is no offence: therefore does the Sage specify, "through carnal desire." But if she receive the caresses of her husband's brother or kinsman, being impelled by lust or the like, *and not solely guided by the duty of raising up offspring*, still there is no offence: this is also intimated by the text, "who leaves his brother or kinsman." Such a practice actually subsists among some people in particular districts. Yet, in fact, the procreation of a son on the wife of a kinsman is forbidden in the *Cali*-age.

["The procreation of a son by the brother of a *deceased* husband must in the *Cali*-age be avoided."]*

In this text also, "carnal desire" is an instance denoting likewise avarice and other irregular appetites.

"She who having received *injunctions*" (Book IV, v. 158, 8); who has been told by her kinsmen, receive the embraces of such a man; if she take as a husband any other man than him whom her kinsmen assigned, is the fourth disloyal wife: and so is one purchased for money, or impelled by hunger or thirst. Consequently, the several phrases, "having received injunctions," &c. may be taken either conjointly or separately. This sense is denoted: a woman, having lost her husband, but desirous of wedlock, gives herself to some man; she is the fourth disloyal wife: and if a woman, whose husband is living, desert him, and cling to another, but do not return to her *first* husband, she also may be considered as a disloyal wife of the fourth description. This text not specifying, "after her husband's decease," and the preceding text expressing (Book IV, v. 158, 6), "but returns to the house of her lord," there is no confusion.

* The text here partially quoted is nowhere cited at large. Similar texts are cited in the fifth book. See likewise Book IV, v. 157, and a general note to the translation of MENU (v. 3.)

Since he enjoys with a previous title this woman, who is another's wife, he must pay the debts contracted by her husband : and this must be considered as exclusive of an unmarried harlot.

222.

CÁTYÁYANA :—A debt which has been contracted by indigent and childless vintners and the rest, must be paid by him who has the care of their wives.

Under the term "and the rest" are comprehended *all* persons whose livelihood depends on their wives. MISRA.

"Wives" being here mentioned in the plural number, disloyal wives of every description are suggested. Consequently he who posseses the wife of a deceased vintner or the like, assimilated to property, because she is able to support the family, must pay the debt of her husband. This is ordained by the text, and should not be controverted. Accordingly the following text of NÁREDA has a suitable import; otherwise it would be a needless repetition of the preceding text (221).

223.

NÁREDA :—He who approaches the widow of an indigent man leaving no male issue, must pay the debt of her husband ; she is considered as his property.

And this seems to have been the opinion of CHANDÉSWARA. Accordingly he says, 'this text of NÁREDA also has the same import with the text of CÁTYÁYANA' (222). That again is a proper construction; for in the texts of CÁTYÁYANA (173, 2), of NÁREDA (172), and of VRIHASPATI (174), the expression, "he who takes the widow" (*strihári*), exhibits the verb *hri* in the sense of possession; and in the text of YÁJNYAWALCYA (171), and rule of VISHNU (220), the similar expression (*strigráhi*) exhibits the verb *grah* in the sense of caption or occupancy: but here (222 and 223) the verbs *bhuj* and *in*, preceded by the inseparable particle *upa*, (in the words *upa bhóctà* and *upaiti*,) signify enjoyment and approach. The preceding text of NÁREDA (221) does not propound the obligation on him who takes the widow to pay the debt of her husband ; but the obligation on him to pay the debt on failure of heirs and sons, having been already stated (172), it propounds a special rule. There is consequently no objection to take the radical *aś* (of the word *samaśnuté*) in the sense of enjoyment or possession (221). Accordingly NÁREDA adds, "she is considered as his property" (223) he benefits by the wife of the deceased, through the wealth brought with her. Or the relative, used adverbially in that phrase, denotes the woman. But he who enjoys the widow is only liable on failure of a guardian of the widow, and on failure of sons and grandsons not competent *to the management of affairs*. However, it is held, in the *Retnácara* and other works, that this rule of decision concerns only those women on whose labour their husbands depend chiefly for their livelihood. The same opinion is almost expressly delivered by the author of the *Mitácshará*. In the last case and in this, the difference between him who takes the widow, *or becomes her guardian*, and him who enjoys the widow, *or becomes her paramour*, is evidently the same as between a man who has the care of another's land, and one who has the enjoyment of it.

But some hold, that one text (223) propounds generally the payment of debts by him who takes the widow; the other text (221) ordains specially the payment of debts by him who takes the widow *under particular circumstances:* there is consequently no *vain* repetition. CÁTYÁYANA directs payment by him who has taken the widow, if there be a son living, but incompetent *to the conduct of affairs* (174, 2); in another text (222) he directs that the debt of one who had no male issue, or whose son is deceased, shall be paid by him who has the care of the widow: there is consequently no *vain* repetition. It follows, that he who enjoys a disloyal wife of another description, need not pay her husband's debt.

That is liable to objection; for the preceding text of NÁREDA (172) would contain a needless repetition of the text last cited (223). That point should be examined. This description of women is greatly blamed by legislators. That the wives of *Bráhmanas*, and other virtuous women, do not so act, may be learnt in the discussion of the duties of Man and Wife.

When a son competent *to the management of affairs* is living, and there is also a guardian of the widow, the debt must *in general* be paid by the son alone, as has been already mentioned. From this rule CÁTYÁYANA propounds a particular exception.

224.

CÁTYÁYANA:—Should a widow, who has several property, take the protection of another man without the assent of her son, her property may be seized by that son, if there be no daughters:

2. He may seize it to discharge debts, but never for his own gratification, since he cannot compel his parents to pay anything for an improper cause.

3. Of that woman who has male issue, but deserts her son though opulent, MENU declares that her son may take the peculiar property, and discharge therewith his father's debts.

"Without the assent of her son;" or against his consent, "who has several property;" who has considerable female property. "If there be no daughters;" on failure of daughters. The *Retnácara.*

The meaning is this: if a woman, possessing several property, take the protection of another man against the consent of her son, that son may seize her property, but he can only do so when he is unable to discharge debts out of his own property, and not for his own gratification, since he cannot compel his parents to pay anything for an improper cause; that is, he cannot possess himself of the property of his father, or of his mother, for the accomplishment of an unfit purpose. Here the discharge of debts is merely an instance of indispensable duties. The debts may be his own or his father's. But he can only do so if there be no daughter; for, should there be daughters, they are entitled to their mother's several property: and this supposes female property, such as presents given at the bridal procession, and on other occasions: the distinctions *of such property* will be noticed in the Chapter on the Property of Women, under the title of Inheritance. It may be here noticed, that her recourse to another man must be considered as equivalent to the natural decease of the mother. But, at the option of the son, her title to several property may depart or subsist, under the authority of the text, (Book V, v. 405, 1 and 2).

If a woman, deserting her son, though capable *of protecting her*, take her several property, and recur to another man without the consent of her son, that son, seizing even her several property, may discharge debts therewith : such is the sense of the third verse (224, 3).

By the expression "though opulent" it is shown, that if she desert an indigent son, assuredly that son may seize her several property.

The *Retnácara.*

"Who has male issue" describes the woman. From the particle in the phrase "seizing even her several property," it follows, that if any part of his patrimony have been taken, assuredly he may seize that. The debt *to be paid* should be the debt of his father; for the text specifies "his father's debts." *The commentator says*, "assuredly that son may seize her several property;" here "for the payment of debts" should be subjoined : and this is evident from the text. The term *translated* "opulent," but literally signifying "capable," here imports possessing wealth ; "incapable" signifies moneyless. The difference is this : if she deserted an opulent son, he can only seize her several property for the discharge of his father's debts ; but if she abandon an indigent son, he may seize it for payment even of his own debts. But, if the woman have no several property, the son alone must discharge the debt. This NÁREDA declares.

225.

NÁREDA :—But *if* a woman who has male issue, *but no several property,* desert her son, and recur to another man, her son alone must pay the whole debt of her *deceased* lord.

If she desert an opulent *or capable* son, and take the protection of another man, without *carrying* any former property, her son alone must pay the debt contracted by her *deceased* lord. The *Retnácara.*

Consequently the construction is, her son is liable for, and must pay, the debt of her lord ; and that, provided the son be competent *to the conduct of affairs ;* else he who takes the widow would be liable for the payment of debts : hence the commentator adds "capable *or opulent.*" It has been declared (172), that a son not competent *to the management of affairs* must discharge the debt on failure of a guardian of the widow ; by this text it is declared, that a son competent *to conduct affairs* must discharge the debt, although a man have taken the widow : consequently there is no vain repetition. The debtor being dead, his son competent *to manage affairs* must pay the father's debt out of the several property of his adulterous mother, or out of his own property, whichever may be practicable : this is shown by what has preceded.

226.

NÁREDA :—But if a woman take the protection of another man, carrying her riches and her offspring, he must pay the debt of her husband, or abandon such a woman.

"Carrying her riches;" possessing considerable wealth. "Her husband;" her wedded lord. Or, to avoid the payment of the debt, he must abandon such a woman, who brings her offspring and her wealth.

The *Retnácara*.

227.

CÁTYÁYANA:—If a woman, having an infant son and much wealth, seek another protector, he whose protection is taken, must pay the debt *of her husband:* this law is declared in respect of women who have infant sons.

Here the term employed (*bhartri*) signifies one who maintains her, *not one who marries her*. "Seek," or recur to 'for support:' the text should be so supplied. Consequently the guardian to whom the mother of an infant son, but possessing much wealth, recurs for the support of her son and herself, must, if he accept the trust, pay the debt of her husband out of her property; or, paying it out of his own property, he shall afterwards obtain re-imbursement. Such is the sense of the text: and he must also maintain both the mother and son. There is no vain repetition of the preceding text (173). And in this case, the guardian does not take the assets; for the woman alone has the care of the goods. Thus we explain the law.

When the debtor is living, but is mad, has been long absent in a foreign country, is an idiot or the like; in a word, is incapable of discharging debts: in that case, his debt shall be paid by his son alone, as has been already mentioned. But if he have no offspring, what should be ruled? On this point the same legislator propounds a law:

228.

CÁTYÁYANA:—The debts of men long absent in a foreign country, of idiots, madmen, and the like, who have no male kindred, and of religious anchorets, must be paid, even during their lives, *but without interest*, by such as have the care of the *debtor's* wife and goods.

By such as have taken the wife and the goods appertaining to a man long absent in a foreign country, and so forth: and this must be understood, according to circumstances, as intending also outcastes and the like.

Many Sages have declared generally, that the debt must be discharged by him who takes the wife of the debtor; a special rule is here propounded. A man has two wives; one, taking her offspring and her wealth, gives herself to another man, saying, "I am thine;" and the other, who possesses no wealth, takes the protection of a guardian; what is the rule of decision in this case? It is answered, since he who takes the wife with effects in fact holds assets, the debt must be discharged by him; but if both be in the same situation, it must be paid in equal proportions by both. This is the import of the former text (226). But if the receipt of effects were previously unknown, and the creditor exacted immediate payment from him who had the care of his debtor's wife, after which the receipt of effects is discovered, then indeed the payment made by the guardian of the wife is not legal, because it was exacted from a person not justly liable; he may there-

fore recover his money from the creditor, and the creditor shall obtain his due from him alone who holds assets: the holder of assets may be compelled to reimburse the guardian of the wife. Such is the proper mode of adjustment in forensick practice.

A case may be here stated. A certain dishonest surety for payment asked a loan of a money-lender, in the name of a certain borrower; and the lender, fixing stipulated interest at the rate of two *panás*, sent the loan to the borrower through the hands of the surety. Bringing the sum borrowed, the surety told the borrower, "he will not lend the money without stipulated interest at the rate of four *panás*." Urged by distress, the borrower agreed to that interest, and accepted the loan. At the time of payment, the debtor delivered to the surety the sum due on a computation of interest at the rate of four *panás*; but the surety paid the creditor at the rate of two *panás*. After a few days the whole circumstances were discovered. The creditor therefore demands the greater interest from the surety; the debtor also claims the excess from the surety; and the surety refuses to pay it to either of them. What should be the rule of decision in this case? The answer is, the creditor can have no right to receive greater interest than such as he stipulated when he made the loan; the surety is not entitled to obtain interest on another's money; it is, therefore, reasonable that the debtor should recover the sum erroneously paid.

It should not be asked objectively, why should not the debtor pay the interest stipulated by him, for the sake of preserving uprightness *in his dealings?* Deceived by the surety's words, the debtor made the promise before the surety, not before the creditor. That promise only, which was made by the surety, as his representative, in the presence of the creditor, is efficient; not the promise originating in error caused by the surety's fallacy. Again; the creditor may have accepted less interest through tenderness excited by the appearance of distress in the debtor; in that case, the remainder shall benefit the debtor alone, for it was in a manner relinquished to him. Yet, if the debtor voluntarily pay it, the other shall receive it by his voluntary act. But, when an intermediate person himself borrows money, and lends it to the *ultimate* debtor, he is not a surety, but debtor to one and creditor of another: in such a case, therefore, he is entitled to the interest at the rate of four *panás*.

If a debtor had no son born to him, and leave no widow, nor assets, by whom shall his debt be paid? By no one. But if the debtor gave a pledge on contracting the debt, and his great-grandson be living, the debt should be paid by that great-grandson.

229.

YÁJNYAWALCYA:—A debt, secured merely by a written contract, shall be discharged, *from a moral and religious obligation,* only by three persons, *the debtor, his son, and his son's son;* but a pledge shall be enjoyed until actual payment of the debt *by any heir in any degree.**

But if the great-grandson do not wish to redeem the pledge, those who would be entitled to inherit on failure of great-grandsons, may, in the order

* Already cited at v. 38, 2, and partially at v. 111.

of succession, pay the debt and take the mortgaged property. If no one choose to redeem it, the pledgee may continue to enjoy it after acquainting the king; the sum cannot be forcibly exacted from the great-grandson or remoter heir, because, not having yet taken the assets, he is not liable for the debt.

This doubt here occurs: if the debtor contracted the debt, giving a pledge for custody only, and he, his son, and his son's son die, but a great-grandson survive; in that case the debt need not be paid by the great-grandson; for he does not enjoy the mortgaged property, and the pledgee is permitted to enjoy property pledged so long as the debt shall remain unpaid (229): but the great-grandson alone can take the pledge, because it is the chattel of his great-grandfather. The apparent difficulty may be thus reconciled: "but property pledged shall be enjoyed" is an expression merely illustrative of a general sense; in the case supposed, the payment of the debt is alone requisite. Or the word pledge may there signify a pledge given in lieu of interest, as well as a pledge not to be used; and *the word* "enjoy" suggests occupancy as well as fruition: hence there is no difficulty. Else it would be inconsistent with reason, that after advancing his own property and safely keeping the pledge for a long time, the creditor should *be obliged to* restore it to the great-grandson of his debtor without receiving his due. Since the great-grandson or remoter heir holds assets when he has received the pledge, he is bound to pay the debt.

230.

VRĬHASPATI:—He who, having received a sum lent or the like, does not repay it to the owner, will be born *hereafter* in his creditor's house, a slave, a servant, a woman, or a quadruped.

The term here employed signifies a loan. "Or the like" comprehends deposits and so forth. The *Retnácara.*

"To the owner;" to the former master of the sum, that is, to the creditor and so forth. Therefore a debt must necessarily be paid by a son or other descendant, lest his father or ancestor become a slave, otherwise hell awaits him; because he has not followed the conduct prescribed. Thus may the law be concisely stated.

When the creditor is dead, or has become a religious anchoret or the like, the debtor should pay the sum to his son or other heir; on failure of the nearest, to the remoter heir successively down to the learned priest. But if there be no heir, nor any learned priest in that country, or if he refuse the payment tendered, NÁREDA propounds the rule to be observed in that case.

231.

NÁREDA:—If a creditor of the priestly class die, leaving issue, *the king shall* cause the debt to be paid *to them;* if he leave no issue, to his near kinsman; if he leave none who are near, to those who are distant, *paternal or maternal:*

2. If he leave no heirs near or distant, *nor persons connected by sacred studies,* the king shall bestow it on worthy priests; but if none such

are present, let him cast it into the waters: *the debts of other classes, in similar circumstances, he may seize for himself.*

What is due to a priest, whether it be a gratuity or similar *claim,* or the like, must, on failure of him, be paid to his son, or other descendant in the regular order of succession. That is intimated by the phrase "leaving issue." On failure of issue, to his near kinsmen; on failure of them, to distant kinsmen, allied to himself, to his father, or to his mother: this will be explained under the title of Inheritance. On failure of these, it should be given to learned priests; or on failure of them, "let him cast it into the waters." What is due to men of the military and other classes, the debtor should, by parity of reasoning, pay to the heirs in regular succession, delivering it, on failure of nearer heirs, to the next remoter heir down to distant kinsmen: but on failure of these, it must be paid to the king, under the rule of VISHNU concerning hereditable property, "the wealth of all but priests *who die without heirs,* goes to the king (Book V, v. 417)." But the property of priests may, on no account, be taken by the king. In this MISRA, BHAVADÉVA, and others concur; and BAUDHAYANA, quoted in the *Retnácara* under the title of Inheritance, *forbids the sacrilege.* That text (Book V, v. 444) is expounded, "the property of *Bráhmanas* is the most exalted poison to him *who seizes it.*" From the word "never" it appears, that the property of *Bráhmanas* must not even be received in the form of a tax. Accordingly, in his gloss on the institutes of PARÁŚARA, MÁDHAVA cites the following texts of MENU.

232.

MENU:—A king, even though dying *with want,* must not receive any tax from a *Bráhmana* learned in the *Védas.*

MENU:—The king, having ascertained his knowledge of scripture and good morals, must allot him a suitable maintenance, and protect him on all sides, as a father protects his own son.

The king must allot him (that is, the priest) a suitable maintenance, or the means of subsistence; and protect him on all sides, from robbers, rogues, and the like. However, the direction in the text of NÁREDA, "he shall bestow it on worthy priests, or cast it into the waters," is a law respecting the payment of debts.

CHAP. VI.

ON

REDRESS FOR NON-PAYMENT.

This, according to the author of the *Mitácshará*, may be also considered as the rule for receipt of debts by the creditor.

MENU:—What has been practised by learned and virtuous men of twice-born tribes, if it be not inconsistent with the legal customs of provinces or districts, of classes or families, *let the king* establish.*

"Learned;" well read: AMERA interprets it, wise or intelligent. "Virtuous;" endued with honesty; not deceivers. "Twice-born;" *Bráhmanas, Cshatriyas*, and *Vaisyas*: what has been practised by such men; if it be not inconsistent with the legal customs of that country, of families and classes, *let the king* establish or confirm the practice, adopting it as unseen or unrecorded law. The text must be so supplied. CULLÚCABHATTA.

In that gloss the meaning of the expression "confirm the practice" is, that he should decide, according to that practice, a doubtful case, for which no seen or recorded law provides.

233.

MENU:—When a creditor sues before him for the recovery of his right from a debtor, let him cause the debtor to pay what the creditor shall prove due.

"For the recovery of his right from a debtor;" to obtain the sum lent. The king, on application from the owner of the sum *for the recovery of it*, shall compel the debtor to pay to the creditor what he shall prove due by written or oral evidence or the like. CULLÚCABHATTA.

On application from the creditor for the recovery of what is due by the debtor, the king shall, by various means, compel the debtor to pay the creditor's right, or the sum which he proves by evidence to be due from the debtor. CHANDÉSWARA.

In what mode payment should be enforced, MENU declares.

234.

MENU:—By whatever lawful means a creditor may have gotten possession of his own property, let the king ratify such payment by the debtor, though obtained even by compulsory means.

"By compulsory means;" by seizure or distress.

CHANDÉSWARA and CULLÚCABHATTA.

* Already cited at v. 50.

The debtor, or his assets, may be the subject to which that expression refers. The same law-giver declares the several means by which payment may be enforced.

235.

MENU :—By the mode consonant to moral duty, *or by the mediation of friends,* by suit in court, by artful management, or by distress, a creditor may recover the property lent; and, fifthly, by legal force.

He may recover it by the method last mentioned, if payment cannot be obtained by the several methods first mentioned. MISRA.

Another mode will be subsequently mentioned. VRĬHASPATI explains the mode consonant to moral duty.

236.

VRĬHSAPATI :—By the interposition of friends and kinsmen, by mild remonstrances, by importunate following, or by staying constantly at the house of the debtor he may be compelled to pay the debt: this mode of recovery is called a mode consonant to moral duty.

By the persuasive discourse of those who are friends and intimates of the debtor, or his kinsmen, such as maternal uncles and the rest; by mild remonstrances or honied language of the creditor himself; by importunate following or pursuit; by staying constantly at the house of the debtor, or by abiding near him, that is, by the creditor's fasting and the like at the house of the debtor; by all these methods the debtor may be compelled to pay the debt to the creditor: this mode of recovery, by the interposition of friends and the like, is called a mode consonant to moral duty. This is merely an instance; it comprehends the interposition of honest strangers with discourse exciting a sense of shame, and so forth.

CÁTYÁYANA explains the mode of recovery by the suit in court.

237.

CÁTYÁYANA :—A debtor, being arrested, *and freely acknowledging the debt,* may be openly dragged before the publick assembly, and confined until he pay what is due, according to the immemorial usage of the country.

The restraint of the debtor by the creditor before the publick assembly, until he pay the sum due, is the mode of recovery by forensick proceeding.

The *Retnácara.*

He may be detained and confined; he may be stopped and prevented from going where he lists, and so confined. "Before the publick assembly;" otherwise he might allege, that he was excessively beaten, and so forth. "According to the immemorial usage of the country; according to the usage which subsists in that particular country. For example; in some countries creditors cause their debtors to be arrested and confined by the king's officer; in others, they themselves, or their servants, restrain the debtors; in others again, they confine them in fetters.

Or a distinct method of recovering debts is called the mode of recovery consistent with the immemorial usage of the country; or it falls under the description of violent compulsion, and will be hereafter mentioned: "they must be made to pay their debts according to the custom of the country" (142). It is limited by the restriction of the immemorial usage of the country. According to this opinion, the mode of recovery by suit in court, or practice, must be otherwise explained. Thus the *Médhátit'hi* has this remark; 'from a debtor, who is indigent, payment must be obtained by a practical mode; and that practice consists in personal labour, and the like. For instance; a creditor lending a further sum to an indigent debtor, may employ him in his regular occupation, such as husbandry or the like: the produce thereby obtained should be delivered to the creditor.'

This, according to the preceding opinion, is a mode of recovery similar to that of suit in court described by CÁTYÁYANA; it falls under the same description, for the text of CÁTYÁYANA is merely illustrative. In fact, a debtor, being restrained, or being detained for work, otherwise than in the custody of the king's officer and the like, may be employed in his regular occupation, such as agriculture and the like: and in that case, the creditor may not employ a *Bráhmana* in menial service, nor a *Vaisya* in military duty; in some countries he may employ a *Bráhmana* in agriculture or commerce, but he may not employ a barber of a mixed class in carrying burdens. To indicate this and other circumstances, the legislator adds, "according to the immemorial usage of the country." That intends also the customs of families, and the usage established by law, and the like. Consequently, the meaning is, a creditor may not employ his debtor in work inconsistent with usage. Again; in that country where men of certain classes do not carry in a litter men of certain other classes, the creditor may not employ one of such a class in carrying the litter of a man of such other class.

By the phrase "before a *publick* assembly" it is intimated, that the persons assembled should interpose to prevent such irregular employment. The possible accusation of maltreatment is thereby obviated, as before. Or the expression "before a publick assembly" is intended to suggest the approbation to be obtained from impartial persons, in this form, "this work, which is not inconsistent with local usage, the debtor must perform;" it obviates the possible accusation of infringing the custom. This and other points may be deduced from reasoning.

"Until he pay what is due;" consequently, if the debt were discharged the creditor must omit the restraint and other measures. This is mentioned *incidentally*, wandering from the real subject.

VRĬHASPATI explains artful management:

238.

VRĬHASPATI:—When a creditor, with an artful design, borrows any thing of his debtor, or withholds a thing deposited by him or the like, and thus compels payment of the debt, this is *called* legal deceit.

"With an artful design;" by stratagem. For instance; the creditor borrows effects of the debtor on such pretences as the following, and thus compels payment of the debt: "a guest of high rank is come to my house, lend me a metallick caldron for his service;" or on this pretence, "a kinsman of the bride is come to visit the bridegroom, lend me silk clothes, ornaments, and the like, to array the bridegroom."

"Withholds a thing deposited by him;" or anything subsequently intrusted. For instance; a creditor, who had formerly lent ten *cárshápanás*, but cannot recover the sum, resolves on using artifice, and the debtor is desirous of borrowing a further sum; the creditor tells him, "I will further lend you fifty *panás* of copper, and you shall pay the whole at once, but you must give a pledge." The debtor, so addressed, delivers a pledge of greater value; and the creditor, giving a small part of the sum, tells him, "I will give the whole sum the day after to-morrow." On that day he delivers the sum diminished by the amount of his former debt, or attaches a sufficient part of the pledge. In such a case he withholds a thing subsequently intrusted. The term "and the like" comprehends deposits and the rest. In such a case, there is not the absolute sin of wronging one who has reposed confidence in him, provided he do not take more than is due.

Again; a dishonest debtor, delivering a pledge for custody only, receives a loan, but refuses to pay the debt at its term; the cunning creditor mentions, in various places, "his pledge, which was in my possession, has been stolen by thieves." On hearing this through successive report, the debtor tenders the principal with interest, and demands his pledge; and that creditor delivers the pledge, *and takes the sum tendered.* In this case the fallacy must be considered as an artifice. Such a mode of recovering debts is called legal deceit. Deceit (*upadhi*) is synonymous with artifice.

Vrĭhaspati also explains distress:

239.

Vrĭhaspati:—When he forces the debtor to pay by confining his son, his wife, or his cattle, or by watching constantly at his door, that is called lawful confinement.

The method of recovery by the restraint of his wife, his son, or his cattle, or by watching at his door, is called lawful confinement, or distress. This is a mere illustration; the ultimate sense is, 'causing him to *suffer* inconvenience by any mode.' However, that should not be done, by which he may be exposed to great danger. This we hold reasonable.

The same legislator explains legal force:

240.

Vrĭhaspati:—When, having tied the debtor, he carries him to his own house, and by beating or other means compels him to pay, this is called violent compulsion.

Binding him and carrying him to his own house, he may threaten to beat him and so forth; frightened by those menaces, the debtor pays the debt: in such a case, the threat of blows, preceded by confinement, is a mode of recovering debts which is called violent compulsion, or legal force. The carrying of him to his own house is not requisite; for the threat of beating him on the road, or at some other place, is violent compulsion. The binding may be no more than *forcible* seizure; consequently the threat of blows, after catching him by the hair, must be deemed violent compulsion.

Violent compulsion is a mode of recovery defined as consisting in blows and the like, after carrying the debtor to his own house.

The *Retnácara.*

According to this author, even blows are authorized. Under the term "and the like" is comprehended harsh reproof, or verbal abuse and the like.

241.

CÁTYÁYANA:—By beating, or by coercion, a creditor may enforce payment from his debtor; or by work, by suit in court, or by mild remonstrance: first *duly* deliberating *on the method to be followed:*

2. Or let him obtain the sum due, by artifice, or distress.

In this text, "beating" signifies legal force, or violent compulsion: "coercion," staying constantly at the house of the debtor, or importunate attendance. The term is so explained in the gloss of the *Retnácara:* in effect it denotes the creditor himself refraining from food and the like; and that falls within the mode consonant to moral duty, as described by VRĬHASPATI. CHANDÉSWARA explains, "work," or *proper* conduct, by an example: for instance, reflecting, "he is very dishonest, and will not repay the loan he receives from me; I must recover the debt by blows and other suitable methods:" the creditor adopts proper measures. Ultimately it suggests both means, *proper conduct, and obliging the debtor to work;* this *last* falls under the description of mild methods: it does not vary from the sense of MENU's text, or "work" may bear the *literal* sense of labour: it shall be subsequently discussed under the text of YÁJNYAWALCYA. But "suit in court," *which has been explained as a similar mode,* is also noticed by CÁTYÁYANA. "Mild remonstrances; affectionate language, with praise and the like. "Deliberating;" determining after due deliberation.

CÁTYÁYANA next declares from what debtor payment should be obtained, in what mode.

242.

CÁTYÁYANA:—By mild expostulation let a creditor procure payment from a king, from his master, and from a priest; but from an evil-minded man, or an heir, by some artful contrivance.

2. MENU ordained, that merchants, cultivators of land, and artists, must be made to pay their debts according to the custom of the country; but that a creditor might enforce payment from dishonest debtors by violent measures.

"Heir;" inheritor. In some places the text is read, "BHRĬGU ordained."

He ordained, that merchants, cultivators of land, and artists, must be made to pay their debts according to the custom of the country.

The *Retnácara.*

"A priest," or spiritual parent: but if any other than a priest happen to be spiritual parent *of the creditor,* he also is suggested by the word "priest" taken illustratively. Again; the word "priest" *(vipra)* may be taken in the simple sense of venerable, for it has that import; and a person to whom veneration is due from the creditor is meant. Why are the "king" and "the creditor's master" separately mentioned? The answer is, because disrespect to the king, or to his own master, produces evil in this world; to intimate this, they have been separately mentioned. It may be here remarked, that in some instances even a *Śúdra* is venerable.

YÁJNYAWALCYA:—Science, moral conduct, age, kindred and wealth entitle men to respect; and most, that which is first mentioned in order: with these qualities, even a *Súdra* deserves respect in his old age.

With these qualities in an eminent degree, namely, science and the rest, even *Súdra* is entitled to veneration, when his age passes ninety years. Thus MENU expresses, "even a *Súdra is venerable*, if he have entered the tenth decade of his age."* The *Dipacalicá*

Should many venerable persons be assembled, respect must be first shown in society to the learned man; next to him, whose conduct is pure; afterwards, to the aged man; next, to one who has learned kinsmen and the like; and lastly, to the wealthy man. And this concerns priests: valour and the like chiefly entitle a soldier to respect; and riches, a merchant. But here, should many learned men be assembled, the precedence must be regulated by the pre-eminence of their respective sciences; for the *Srí Bhágavata* records, "That indeed a science, by which the knowledge of God is advanced." Science, consisting in knowledge, which advances *diligent* obséquiousness, entitles a *Súdra* to respect: or skill in arts, the science of medicine, or the military art. *From him payment must be procured* by mild remonstrance, tender expostulation, or the interposition of friends and kinsmen. Surely, from a soldier and the rest, *payment must be procured by this mode*. "An evil-minded man;" one who is dishonest, but not unentitled to respect. It is the same in regard to soldiers and the rest, who cannot be treated with disrespect. It is also the same in regard to kindred, pupils, and the like.

"And artists" (242, 2); the particle suggests the comprehension of *Vaisyas* and the rest. "Dishonest debtors;" averse from the discharge of their debts, not afraid of acting immorally, ignorant and so forth, but not entitled to respect; in a word, *Súdras* and the rest. Distress must be employed when violent measures cannot be adopted. The term used in the text signifies violent measures.

In defining the mode of recovering debts by suit in court (237), it is said "arrested, dragged *and confined*." How can that be? For, should the ejection of urine and feces, and other corporeal necessities, be prevented, life could not be preserved. For this, CÁTYÁYANA delivers a precept:

243.

CÁTYÁYANA:—When a prisoner has need of ejecting urine or feces, he should either be followed *at a distance* or dismissed in fetters:

2. Should he have given a surety, he must be released each day, at the hour of meals; and at night, if a surety have been given to such effect:

3. But, if he do not tender a surety for appearance, nor avail himself of such a surety, he must be confined in jail, or delivered to the custody of keepers.

* Chap. II, v. 137.

4. A venerable, trustworthy and virtuous man shall not be confined in jail; unrestrained, he must be released, or *be dismissed* under the obligation of an oath.

"When he has need, &c." when he intimates such occasion, he must be followed, *or watched*, at a distance from the place where urine and feces are ejected. "Or dismissed in fetters;" bound by chains and the like. Two disjunctive particles, here employed, are intended to show distinct rules governed by the nature or amount of the debt, and by the character of the debtor.

What should be done at the hour of meals? The legislator adds, "should he have given a surety," should a surety have been given, or a sponsor assigned, he must be released each day, at that hour of meals for which the surety became answerable. Consequently, after taking a surety for the hour of meals, he should be daily released. In the *Retnácara* the terms are expounded, a prisoner from whom a surety is taken. From the expression "each day," it appears that a surety should be taken each day, that is at the hour of sunrise. Still, however, the terms "and at night," authorize the release of a debtor at night also, when a surety has been previously taken: and the word "day" may signify a day and night. A synonymous term, bearing a general sense, occurs in the text concerning hair-interest (35, 4). *Yet* the acceptation may follow the texts of Sages concerning attendance on cattle; for instance, the text cited in the *Práyaśchitta tatwa*.*

This must be understood, when he cannot obtain his repast without giving a surety. "And at night;" even at night, if a surety say, "this man shall be produced by me, let him go home at night:" in that case he should also be released at night. But, if no man become surety for him, because he is suspected of dishonesty; or if he do not seek bail; or, having given a surety for appearance, if the debtor, being released, do not again apply to his surety; what should be done in these cases? The legislator says, "if he do not tender a surety for appearance (if he cannot obtain a surety), or do not avail himself of such a surety" (or do not so act as is proper after finding bail); or, having given bail, and being liberated by the creditor, if he do not again attend his surety, that is, if he conceal himself from him and so forth, (both may be understood from the ambiguous terms of the text;) *in these cases*, should he be at any time discovered after laborious search, he shall be confined in jail; that is, he shall be confined at night within closed gates and the like: but at the hour of meals he must be followed by the creditor himself, or be suffered to take his repast bound in fetters or the like; in the same manner he should be allowed to bathe, but, if possible, he should take his repast within the prison. If there be keepers of the jail, let the creditor imprison him there, after giving notice to the jailors. But when the creditor himself enforces payment of the debt, he may confine him in his own house.

But if the debtor be not liable to confinement in prison, or if he be trustworthy, the creditor shall not confine him in a jail. This the legislator declares (243, 4). Should such a venerable person be not trustworthy, or, though *in general* trustworthy, if confidence be not placed in him, he must be dismissed under the obligation of an oath. This and other points may be argued.

* Cited here at full length, but omitted in its proper place, Book III, Chap. IV. (See note to v. 9 of that Chapter.)

CHANDÉSWARA and the rest give a similar exposition; but in his gloss it is said, 'if the debtor do not tender, or if he refuse to give, a surety for appearance or other sponsor.' The word 'other' intends a surety for payment. Consequently "surety for appearance" is considered as merely illustrative. The term (translated do not "avail himself") is here explained as signifying "refuse." The disjunctive particle has a reference to the word "tender," which occurs in the text. His refusal may be in this form, "how should I give a surety, I am not trusted?" Such a speech, when he is arrested by the creditor or the king, *is deemed a refusal.* But in fact a surety for payment can hardly be supposed *in the present case.* For instance; should any one say, "release this man, I will pay what is due by him," the creditor may reply, "the term of payment has already elapsed, discharge it therefore immediately:" with this notion, a surety for appearance *only* is mentioned. However, since the term *of payment* may be enlarged through the interposition of mediators, it is possible that a surety for payment should also be given. The opinion of CHANDÉSWARA may therefore be justified. The confinement of a trustworthy man is unnecessary, because he can give a surety.

244.

VRĬHASPATI:—From a debtor who promises payment, the debt may be recovered by mild remonstrance and the like, and by *employing him in* work, by the mode of *moral* duty, by legal deceit, by violent compulsion, and by confinement at home.

"By mild remonstrance and the like;" since the interposition of friends and the rest, and the withholding of a deposit and the like, are comprehended under the term "and the like," those modes of recovering a debt which are consonant to moral duty and so forth are alone exhibited: the legislator himself details those very modes of recovery, by mild remonstrance and the rest, "by the mode of moral duty, by legal deceit, &c." "By confinement at home;" by the mode of lawful confinement: for he himself denominates confinement at home, the mode of lawful confinement. *By employing him in* work;" by labour. On this consideration, CHANDÉSWARA has not admitted the enunciation of the word "labour" in the definition of violent compulsion. By him four methods only are mentioned. Suit in court falls within the mode of violent compulsion. There is not consequently any contradiction to MENU, who notices five modes. CÁTYÁYANA has not separately mentioned distress or lawful confinement. It falls under the description of compulsory means, *but* is a slighter compulsion, as has been already remarked.

By what means shall payment be obtained from him who has no assets? Wanting funds, what can he pay? Therefore does MENU propound a mode of discharging debts in such cases.

245.

MENU:—Even by personal labour shall the debtor pay what is adjudged, if he be of the same class with the creditor, or of a lower; but a debtor of a higher class must pay it *according to his income,* by little and little.

A debtor of equal or inferior class to the creditor should, by labour, put himself on a par with his creditor; the parity consists in mutual exoneration from debt: consequently the sense is, he should discharge the debt. Before

the debt was discharged, there was this disparity, that one was creditor, the other debtor; but the debt being discharged by means of lobour, on a computation of the hire for work performed, that disparity vanishes. Work must be performed by him alone, the rule of whose class, country, and family, is not thereby infringed, as has been already remarked: but if the creditor be of the commercial class, and the debtor of the military class, the law-giver declares what should be done: "but a debtor of a higher *or superior* class must pay it by little and little." Here it should be considered, that the debtor of a higher class should be employed in labour consistent with his regular occupation, at some other suitable place, not at the creditor's house; after assigning a sufficient portion of his earnings for the maintenance of his family, the remainder should be delivered to the creditor.

But if the creditor, as well as the debtor, be of the sacerdotal class, may the creditor oblige that debtor to work for him, since he is of equal class? or may he not so employ him?

246.

VRĬHASPATI:—If the debtor be really poor, the creditor may take him to his own house, and oblige him to work in distilling spirits and the like; but a priest must be made to pay gradually.

"In distilling spirits and the like;" since the text coincides with that of MENU, a debtor of equal or inferior class is intended. But the subsequent phrase intimates, that a *Bráhmana*, even though indebted to a man of the same class, shall not be compelled to work; for if it supposed him indebted to a *Cshatriya* or the rest, the text would be nugatory. The reason is, that *Bráhmanas* are eminent in respect of each other; for their greatness is unlimited.

247.

YÁJNYAWALCYA:—He may compel a poor debtor of a low class to do work by way of paying his debt: but a priest, if indigent, must be made to pay gradually according to his income, *or casual gains.*

"By way of paying his debt;" for the discharge of his debt. "According to his income;" according to the acquisition of funds. The *Retnácara.*

But we expound "a low class," a lower class than the sacerdotal tribe, namely, the military class and the rest. "Gradually;" employing a priest in his regular occupation, as sacrificing and collecting alms; or, if that fail, in bearing arms and the like; and out of his earnings, supplying the maintenance of his family with frugality, the remainder should be applied to the discharge of his debt. In proportion as a surplus remains, should the debt be discharged: and this appears from the expression, "a priest must be made to pay gradually." But here "a low class" is taken as intending also an equal class; and "priest," as intending a superior class. This is likewise remarked in the *Mitácshará.* The text also concerns a debtor of equal class, as well as of inferior class. CÁTYÁYANA declares it expressly.

248.

CÁTYÁYANA:—The creditor may exact payment by labour from a debtor of the military, commercial, or servile class, if he be either equal to himself or lower.

By the enumeration of "military, commercial and servile classes," it is here intimated, that payment of a debt should be procured from a man of the priestly class by another mode: and that has been already propounded, as declared by VRĬHASPATI and YÁJNYAWALCYA. The term "servile class" intends generally any very low class, and comprehends therefore mixed classes, such as *Múrdhábhishicta* and the rest. The particulars of these classes should be delivered under the title where Tribes are considered.

He should only compel his debtor to perform work which is not reprehended, as has been already hinted: but if he oblige him to perform work which is reprehended, what should follow?

249.

CÁTYÁYANA:—But if he compel the debtor to do any improper work, not stipulated at first, he shall be fined in the first amercement, and the debtor shall be released from his demand.

"Not stipulated at first;" not mentioned when the debt was contracted. For instance; if the debtor said, "I will pay thee this debt by any work, even the most abject, if I cannot discharge it by honourable means;" in that case such work has been stipulated: but if he simply say, "I will pay the debt," or "I will discharge it by labour;" in that case, should the creditor oblige him to perform such work, which has not been stipulated, the creditor shall pay the first amercement, that is, a fine denominated the first amercement. That fine is explained by MENU; "Now two hundred and fifty *panás* are declared to be the first amercement." This may be properly discussed under the title of Fines.

That sort of labour is reprehended, which is not authorized by the system of law. For example; the regular employment of a *Cshatriya* is the use of arms offensive and defensive; but if that fail, commerce and certain other occupations are authorized by the law: work of a different nature is reprehended. But to a *Cshatriya* who abandons not his own profession, however, distressed, commerce and the rest, are also abject occupations. Yet to him who has undertaken commerce and the like, or is willing to undertake it, such an occupation is not a blameable employment. However, service and low mechanical arts are abject occupations. The same should be understood in regard to men of the commercial class and the rest: and that is ascertained from practice. This has been sufficiently explained.

It should be here remarked, that a *Bráhmana*, who subsists even by agriculture, is not considered as following a profession foreign to him: the creditor may not tell him, "following the profession of arms or the like, and *thereby*, earning money, pay the debt." Again; daughters, sons, and the rest, should not be sold: *therefore*, from parity of reasoning, no debtor whosoever can be compelled to sell his children, inasmuch as the act is immoral.

The debtor is exonerated from the debt. The *Retnácara*.

By labour alone a debt is fully discharged; but release from the demand is again mentioned to show that in this case the debtor is exonerated, however inconsiderable the work performed.

250.

NÁREDA:—Should a debtor be disabled, by *famine or other* calamity of the time, from paying the whole debt, he shall be only

compelled to pay it *in small sums*, from time to time, according to his ability, as he happens to gain property.

Should he be disabled from paying the debt, through some calamity of the time, that is, in consequence of famine or the like. The *Retnácara.*

Some hold, that this text concerns *Bráhmanas* and debtors superior in class to the creditor; for it coincides with the text of MENU and the rest. But, in fact, this text may also be applicable to any case where the creditor cannot oblige him to work, or where the debtor is incapable of labour.

It should be here understood, that MENU (233) directs payment to be enforced by the king; the subsequent text (234) seems also to intend payment enforced by the king. The creditor therefore applies to the king, saying, "this debtor does not liquidate my debt;" the king, finding that the debt is to be recovered from a man of the priestly class, adopts the mode of moral duty: calling the debtor's intimate friend or the like, he sends him to obtain payment of the debt from that man by mild expostulation; or procures payment by his own mild remonstrances; or suffers the creditor to beset the house of the debtor, fasting there. But if the debtor be a merchant, he shall only be made to pay the debt according to the custom of the country; the king himself should confine him in the custody of his own officers: this and other modes should be understood. But if the debtor be very contumacious, and one whom the king cannot reduce by reason of his great power, he should bid the creditor procure payment by withholding a deposit or the like. The mode of violent compulsion is obvious. If that be not practised, he should send the creditor to pursue the mode of lawful confinement or distress: this mode has been discussed. Suit in court, or, as explained in the *Médhátit'hi*, practice *of labour*, should be followed for the recovery of a debt from a very indigent debtor. It consists in this: taking a further sum from the creditor, let the king advance it to the debtor, who must labour in husbandry, commerce, or the like, and deliver to the creditor the property thereby gained. This appears from a brief examination of the subject.

In these definitions of the modes of recovery, creditor is mentioned indeterminately; but is described as a person recovering his property, as one who had advanced money, as owner of the effects. It follows, that these methods are universally applicable to deposits and the like. Accordingly, in the Chapter on Redemption of Pledges, "deceit" and "confinement" are mentioned in the text of VRĬHASPATI (102); it thence appears, that the king shall not compel a creditor to restore a pledge to the debtor, by the mode of confinement and the rest: wherefore "debtor," in the definition of lawful confinement, must be understood to signify one who has received property *from another.*

If the creditor do not apply to the king, but himself procure payment of the debt by some legal mode, such as that of moral duty and the rest, shall he be punished or not? On this subject MENU declares *the law*:

251.

MENU:—That creditor who recovers his right from a debtor, must not be rebuked by the king for retaking his own property.

A creditor, pursuing modes of recovery, such as that of moral duty and the rest, in proper cases, shall not be checked by the king: such is the sense. The *Retnácara.*

"In proper cases;" pursuing the mode of moral duty, if the debtor be of the priestly class and the like; deceit, if he be an heir and so forth. "The creditor shall not be checked;" then surely he shall not be punished. But if he act contrary to law, a punishment shall be inflicted. This appears from the terms used in the *Retnácara;* and that punishment may be harsh rebuke or other correction: this can only be discussed with propriety under the title of Punishment.

CULLÚCABHATTA expounds "he shall not be rebuked," he shall not be chidden by the king in these terms: "hast thou dared to recover the debt from thy debtor by violent means without acquainting me?" If there be no reproof, surely there shall be no punishment.

252.

VISHNU:—A creditor recovering the sum lent by any *lawful* means, detention, bondage, or the like, shall not be reproved by the king; if the debtor, so forced to discharge the debt, complain to the king, he shall be fined in an equal sum.

"An equal sum;" a sum equal to the debt recovered. The *Retnácara.*

"Detention;" lawful confinement and suit in court, as described by CÁTYÁYANA. "Bondage;" violent means. The term "or the like," comprehends the other modes of recovery.

253.

YÁJNYAWALCYA:—He who recovers an acknowledged debt by his own act, *in any of the legal modes to which the debtor has tacitly consented,* shall not be blamed by the king; and if the debtor shall complain of such an act before the king, he shall be fined, and compelled to pay the debt.

"Acknowledged;" owned. The *Mitácshará.*

A creditor recovering an acknowledged sum, or a debt proved by witnesses or the like, shall not be blamed by the king in these terms, "why didst thou so?" If a debtor, on whom violent means and the like have been used to enforce payment, wickedly complain before the king, he shall be blamed by the king, that is, he shall be fined, and he shall be compelled to pay the debt. This exposition is approved in the *Dipacalicá.* The text already cited from VISHNU, regulates the amount of the fine; he shall therefore be amerced in a sum equal to the debt.

Is not an amercement equal to the amount of the debt inconsistent with the following text of MENU?

254.

MENU:—The debtor, who complains before the king, that his creditor has recovered the debt by his own legal act, *as before mentioned,* shall be compelled by the king to pay a quarter of the sum *as a fine,* and the creditor shall be left in possession of his own.

It appears from this text, that he shall be fined in a fourth part of the debt. On this CHANDÉSWARA remarks, that 'an amercement equal to a fourth part of the sum must be understood, when the offender is unable to pay a *larger* fine, or is *in general* virtuous.' Consequently, a fine equal to the whole sum is considered as the general rule. But CULLÚCABHATTA thus expounds the text: 'should a debtor complain to the king against a creditor who recovered the debt by his own act, thinking that he has great influence over the monarch, that debtor shall be fined in a quarter of the debt, and the sum *recovered* shall be assigned to the creditor.' And that is reasonable; for it was proper that he should recover the debt by application through some person near the king: in this case, since the creditor may also be charged with a slight offence, a smaller fine is imposed on the debtor. Again: if the debtor be *in general* virtuous, or be unable to pay a large fine, the same consequence is reasonable; and the exposition adopted by CHANDÉSWARA may therefore be justified.

Yet some think, that because the institutes of MENU prevail over all other codes, his texts should not be restricted in consequence of a rule of VISHNU. The fine specified by MENU must therefore be considered as the general amercement; and according to that text, and restricting the law propounded by VISHNU, his rule must be applied to the case of a very dishonest debtor. That is wrong; for the law, as propounded by MENU, still needs qualification. The rule of VISHNU, *thus expounded*, signifies, that a very perverse debtor, complaining before the king of his creditors enforcing payment, shall be fined in a sum equal to the debt; it still contradicts the text of MENU, for that signifies, that a debtor, complaining before the king, shall be fined in a quarter of the debt: to reconcile the apparent inconsistency with the rule of VISHNU, "not dishonest" must be given as an epithet to "debtor" in the text of MENU; and the law, propounded by MENU, has needed qualification. This must be admitted by the wise.

But if the debtor be unable to pay the sum by any means whatsoever, wheel-interest may be exacted at the choice of the creditor.

255.

VRĬHASPATI:—After the time for payment has past, and when the interest ceases, *on becoming equal to the principal*, the creditor may either recover his debt, or require a new writing in the form of wheel-interest *(chacravrĭddhi)*.

"When interest ceases," after accumulating to its limit.

The *Retnácara*.

"After the time for payment has past;" this may be considered as relating to a loan for a specified time. "When interest ceases," concerns a debt unlimited as to time. Hence it appears, that if a creditor, by violent methods or the like, exact payment of a sum lent for a limited time before its term has expired, or of a debt for no limited time before interest ceases, he shall be punished. But if he can recover it by mild expostulations, no offence shall be imputed to the creditor, as suggested by another text of VRĬHASPATI (166, 2).

"Or require a new writing," (that is, a written contract,) in the form of wheel-interest. Making the doubled sum the principal, and stipulating interest afresh, he may require a new writing, after cancelling the former note

256.

CÁTYÁYANA :—Twice the sum lent should always be received by the creditor, *if the debt be of long standing;* but if *the debtor do* not *pay* twice the principal when interest has ceased, the creditor may again exact *an agreement for* interest.

"Twice the sum" is here mentioned on the supposition of a debt consisting of gold or the like; but if clothes or other commodities were lent, four times the value, or other multiple *of it,* as declared *by the law,* must be understood. Accordingly VRIHASPATI, says generally, "when interest ceases."

"When interest has ceased" (256); when interest has stopped; if he do not then pay: the text must be so supplied. In that case "the creditor may again exact interest;" making the former debt, together with interest, his present principal, he may stipulate interest afresh: and this is the wheel-interest mentioned by VRÏHASPATI. Such wheel-interest is of three kinds, as declared by MENU.

257.

MENU :—He who cannot pay the debt *at the fixed time,* and wishes to renew the contract, may renew it in writing, *with the creditor's assent,* if he pay *all* the interest then due;

2. But if, by some *unavoidable accident,* he cannot pay the whole interest, he may insert *as principal* in the renewed contract so much of the interest accrued as he ought to pay.

"Then due;" the interest legally due to the creditor: paying the whole or a part of that, he may renew the contract or writing; that is, tearing the former writing, he may execute a new bond. If the whole interest be paid, fresh interest on the original debt only is stipulated: this is one form of wheel-interest; and in this case the expression "he who cannot pay the debt" signifies one who is only unable to pay the principal. If a part of the interest be paid, interest may be stipulated afresh on the principal of the debt, together with part of the interest accrued: this is another form of wheel-interest; and in this case the expression quoted, signifies one who is unable to pay the original debt, and a part of the interest. But if he do not pay "the interest then due," (for the phrase is connected with the preceding terms,) that is, if he pay no part of the interest, he must renew the debt for the sum then due as a new principal: *in other words,* he must acknowledge it a fresh debt, that is, admit the interest as a debt; and acknowledging it a new debt, it follows of course that interest shall again accrue. Or connecting the phrase with preceding terms, the construction may be thus: 'if he do not pay the amount of interest, he must renew the contract:' consequently, he must renew the written contract, inserting as a new principal the original debt with interest. In this case the expression quoted signifies one who is unable to pay the original debt and the whole of the interest; or that may be the sense in all these cases.

"So much of the interest accrued as he ought to pay:" this is purposely mentioned to remove the doubt how he should pay the interest; whether he may pay any part which is forthcoming, or must pay the whole interest at once. In the preceding text, "if he pay the interest then due,"

it is supposed that he pays the whole interest ; for no distinction is expressed. Consequently, two cases only are fully declared : and by the last phrase, explained "so much of the interest as may happen to be due," it is intimated, that after paying some part of the interest, he should renew the contract, inserting as principal the original debt with *the remaining* part of the interest. Such is the notion entertained by CULLÚCABHATTA. Three cases therefore arise even on this exposition.

When a debtor renews a contract after paying the whole interest *then due*, how can it be wheel-interest, since it does not correspond with the texts of VRĬHASPATI and YÁJNYAWALCYA, describing that as interest upon interest; for in this case there is no interest upon interest? It is answered, the word (*vrĭdd'héh*) is in the fifth, not the sixth, case: consequently, after stipulated or legal interest, *further* interest, which was not promised when the debt was originally contracted, is wheel-interest, or *interest after interest* ; there is no difficulty. Such is the interpretation approved by CHANDÉSWARA ; for he says, 'the debtor may renew the contract with interest on the principal, together with some part of the interest accrued, or on the principal alone.'

Some explain the first text, "if he pay some part of the interest then due." Consequently, if some part of it be paid, or the whole be unpaid, wheel-interest may be stipulated. Two forms of it are therefore mentioned by MENU ; not three, for a third is not specified. But when the whole interest has been paid, if the bond be then renewed, there is no wheel-interest, but a fresh debt by the voluntary act of the debtor. In that case interest is therefore legal in a moral view : but interest upon interest is immoral. Or that also may be deemed immoral, under the text of VRĬHASPATI (35, 7).

But rigid interpreters thus expound the text: he who cannot pay the whole debt, principal and interest, being unable to effect its full discharge, but able to pay some part of the interest, or the whole interest (that is, unable to a certain portion of the debt) must renew the contract in writing : he must stipulate interest afresh, else the renewal of the contract would be useless : and this has been expressly declared by CÁTYÁYANA. How can that be, since there is not a new loan ? Therefore does MENU declare, "he may insert *as principal* in the renewed contract the sum then due." That being the case, must a writing be executed which contains a fallacy? For this cause does the legislator add, "if he cannot pay ; *literally, not producing the sum* :" therefore, mentally paying the sum due, let him borrow it again. If some assets be forthcoming, may, or may not, a part of the interest be paid therewith ? On this point the Sage adds, "he has a right to pay as much of the interest as is possible."*

258.

MENU :—A lender at interest on *the risk of* safe carriage (*chacravrĭddhi,*) who has agreed on the place and time, shall not receive such interest, if *by accident* the goods are not carried to the place, or within the time.

"Who has agreed on the place and time," is thus expounded on the authority of CHANDÉSWARA : the debtor says, "I will pay the debt at such

* According to the literal sense of the text : but it has been otherwise translated on the authority of commentators.

a place, and at such a time;" and the creditor assents to that proposal. Such a creditor is a lender at wheel-interest, having bargained for interest of that description. If he pass that place and time; if he do not go to that place at that time, the creditor shall not receive such interest, namely, wheel-interest: of course he must receive back the sum lent without interest. Hence, even should interest prescribed by the law be stipulated for a certain time and place, it shall not be received by the creditor if he do not attend at that place and time: for that small omission annuls legal interest.

But CULLÚCABHATTA expounds the text otherwise: the term "wheel" denotes the use of a wheel-carriage or the like. A lender who has accepted that by way of interest, and has agreed on the place and time; for instance, *he has agreed, that* "a journey to *Váránasí*, or the use of the carriage for a year, shall be the only interest:" in such a case, if the debtor fail in time and place, if he do not carry *goods* to *Váránasí*, or do not carry *goods* during the year, he shall not receive the benefit, that is, the whole hire of the carriage. Consequently, the whole interest is undischarged.*

259.

VRĬHSAPATI:—As the original debt, together with *the arrear of* interest, becomes a *new* principal, when wheel-interest is received after the debt is doubled, so does the use of a pledge *forborne* become a *new* principal in a similar case.

When wheel-interest is received after the debt is doubled, as in that case the original debt with interest becomes a new principal, so does the use of a pledge also become a new principal in a certain case; that is, even the use and profit of a pledge bear interest. For example; a man borrows money, pledging a cow, on these terms: "this cow shall be milked by you so long as I do not discharge the debt;" or, "this cow shall be milked by you during fifty months;" or, "she shall be milked to make good the interest of the debt." In this case, should the cow accidently die notwithstanding the utmost care, or be stolen by thieves or the like; then, if the debtor do not give a fresh pledge, the value of usufruct and the principal sum must be paid at the time of discharging the debt. But, if the debtor cannot do so, then, being sued before the king or before a publick assembly, or attending the creditor of his own accord, he executes a new writing in the form of wheel-interest. In that case he may execute a bond after paying the value of usufruct; should even that exceed his means, he may add the principal sum to that value, and, inserting as principal the accumulated sum execute a new deed, in which stipulated interest and the like, or legal interest at the rate of an eightieth part and so forth, may be established by consent of both parties; and he may cancel the former note.

Here an observation should be made. When a debt was contracted on these terms, "let this cow be milked until the debt be discharged," but, *afterwards*, the cow being accidentally lost, wheel-interest is stipulated by the debtor, whom the creditor has arrested, it must not be said, that, *in such a case*, the value of the use *lost* before the renewal of the contract should be inserted therein, and the interest subsequent to it must follow the rate of profit from the use *of the cow*. On the contrary, any other rate which may be settled, such as an eightieth part or the like, shall regulate the interest; for, in fact, it becomes a new debt.

* The translation, which I quote unaltered, varies from both comments (MENU; Chap. VIII, v. 156.)

260.

VṚIHASPATI :—This rule concerns an acknowledged debt; but he who contests the demand, shall be compelled to pay, on proof in court by written evidence or oral testimony.

This rule, already propounded, *for* the recovery of a debt by expostulation and other modes, concerns an acknowledged debt, or one which is ascertained to be due. But, if the debtor contest the demand; if he deny the debt, saying, "I owe not the sum," he shall be compelled to pay it, when the debt has been proved by written evidence or the like; he shall not be forced to pay it on the simple affirmation of the creditor. "Or by oral testimony;" the particle is indeterminate comprehending *verbal* contract and the like. For example; the creditor at some *former* time demanded payment of the debt from his debtor; he replied, "I will pay it at the end of a month; If any honest man know this fact, the debt may be thereby proved. So long as it be unproved, the creditor shall not use the means of recovery. If he do, VṚIHASPATI ordains a fine.

261.

VṚIHASPATI :—When the debtor appeals to judicature, or when the demand is unliquidated, he shall never be constrained by the mere act of the creditor; and he who constrains a debtor thus exempted from such constraint, shall be fined according to law.

If the demand be, for any reason, unliquidated or dubious, the debtor, who appeals to judicature, shall not be compelled or forced to pay. He who constrains a debtor thus exempted from constraint or compulsion, shall be fined: and the fine thus ordained must be understood in the case where the creditor enforces payment by his own act, or through the king's officers. But, when that is done by the king, expiation must be performed, for none has mentioned a fine on *the king* himself.

Who is considered as a debtor appealing to judicature? The same legislator replies to that question:

262.

VṚIHASPATI :—A debtor is considered as appealing to judicature, when he says, "I will pay whatever shall by law be declared to be due."

"When he says;" a debtor, who says, &c. A debtor appealing to judicature *(criyávádí)* pleads or claims *(vadati)* actual proof of a fact *(criyá)*; such as legal evidence and so forth.

The same law-giver explains a demand unliquidated:

263.

VṚIHASPATI :—The demand is considered as unliquidated, when a dispute arises between the two parties on the species lent, or its number, weight, or measure, *on the value of a pledge* or the like, on the amount of interest, or on *the question* whether the sum be, or be not due.

"On the species lent;" on the nature of the property lent, whether it be gold, silver, or other species. For instance; it is ascertained, that the debt bears interest at the rate of an eightieth part or the like; and it is also admitted by the debtor, that he contracted the debt in such a month and year; but it is questioned whether the species lent were gold or silver. So, "on its number, weight, or measure," it is questioned whether a hundred pieces, or eighty, were borrowed. Under the term "and the like" is comprehended slavery and so forth. The *Retnácara.*

The meaning is, when a slave has been pledged, it is questioned whether his service were assigned for one or two months. Under the term "and the like" are comprehended the questions, whether a pledge were assigned, or a surety given. "On the amount of interest;" the doubt is, whether the loan bear interest or not, or whether the rate be an eightieth part of the principal. "On the question, whether the sum be, or be not, due;" for instance, the debtor questions whether he received the loan or not; whether he repaid it or not; in other words, whether it be due from him or not; the verb (*dá*, give,) here signifies payment. When a dispute or disagreement arises between the two parties, namely, between the claimant and respondent, that debt, concerning which it arises, is a demand unliquidated. The questions abovementioned are intended by the term dispute. Accordingly MENU (233) directs, that the king shall enforce payment of a debt proved by evidence to be justly demandable from the debtor. That text has been already expounded.

But when a debtor denies a just debt, MENU declares that the king shall enforce payment to the creditor of what is proved by evidence, and exact a fine from the debtor.

264.

MENU:—In a suit for a debt which the defendant denies, let him (*the king*) award payment to the creditor of what, by good evidence, he shall prove due, and exact a small fine, *according to the circumstances of the debtor.*

"Which the defendant denies;" which he disowns. The *Retnácara.*

In a suit for a debt which the debtor denies, affirming that he owes him nothing. CULLÚCABHATTA.

Consequently the debtor, who affirms that he owes nothing, the king shall compel to pay to the creditor what shall be proved due by oral testimony and so forth.

The king shall exact a small fine, because the defendant denied a just debt. The *Retnácara.*

CULLÚCABHATTA states, 'according to the circumstances of the debtor.' For instance: in a case of denial, the king shall exact, according to the circumstances of the man, a less fine than the full amercement of twice the amount of the debt, which will be mentioned.

VRĬHASPATI has directed a fine on the creditor who enforces payment of a debt not proved by evidence, ordaining, that "he who constrains a debtor exempted from such constraint, shall be fined according to law." What sort of fine should be imposed? MENU replies to that question:

265.

MENU :—In the double of that sum which the defendant falsely denies, or on which the complainant falsely declares, shall those two men, wilfully offending against justice, be fined by the king.

The defendant who denies the debt offending intentionally, or the claimant who prefers a false claim for so much money, shall be fined in twice the amount contested ; because these two men, the debtor and creditor, offend against justice. The *Retnácara.*

A question here occurs for discussion : the expression used by VRĬHASPATI, "he who constrains, &c.," signifies one who takes measures adapted to the recovery of the sum. The same is here signified by the expression, "that sum on which the complainant falsely declares ;" for a false claim, in these words, "pay my debt, which is due from thee," is a measure adapted to the recovery of the sum. Now, if a man only declares falsely on the sum, and does not proceed to the actual recovery of it, he shall be fined in double that sum ; but if he proceed to the utmost length, the amercement is no greater : which is a disparity in the law. If this be alleged, the answer is, that the derivation of the term "who constrains" suggests one who takes measures adapted to the recovery of debts ; it does not necessarily signify the utmost process. Hence VRĬHASPATI and MENU concur : and whether or not a greater fine should be exacted, if the false demand be enforced, may be discussed under the title of Fines. But here another fine (that is, a fine on the debtor,) is incidentally propounded by MENU.

This text, ordaining a fine equal to double the amount contested, must be understood of the case where the debt is denied, knowing it to be just, or claimed, knowing it to be false. Such is the opinion of CULLÚCABHATTA.

266.

YÁJNYAWALCYA :—Should a debt, *which was* denied, be proved by evidence, the defendant must pay the sum, and an equal fine to the king; and he who prefers a false claim must pay twice the sum which he demanded.

"Denied ;" disowned : if the debtor affirm, "I owe it not." Should that debt be proved or established by the evidence of witnesses or the like, he must pay a fine to the king equal to the debt contested : but if a false claim be preferred, the claimant must pay a fine to the king equal to twice the sum for which he sued.

This text of YÁJNYAWALCYA, prescribing a fine on the debtor equal to the amount of the debt, must be adduced when there is no intentional offence. There is not any inconsistency. The *Retnácara.*

Consequently there is in fact no variance between CULLÚCABHATTA and the *Retnácara ;* for the intentional offence can only be the conscious affirmation of a falsehood.

Some hold, that since the person who shall receive the sum is not mentioned in the text of MENU (literally translated, "those two men, wilfully offending against justice, shall be forced to pay a fine *equal to* double that sum"), the meaning of the precept, that the debtor shall be forced to pay twice the sum, is, that he shall pay the sum in question to the creditor, and a fine of the same amount to the king. Consequently, a fine on the

debtor, equal to twice the sum contested, is not ordained; the creditor alone shall pay a fine equal to double the sum contested, if he prefer a false claim. And this also coincides with the text of YÁJNYAWALCYA; for both direct, that in whatever case a fine equal to the debt shall be paid by the debtor, in a similar case twice the sum must be paid by the creditor.

That cannot be; for it is unreasonable to impose a double fine for an equal offence.

267.

CÁTYÁYANA:—Any creditor who harasses a debtor appealing to judicature, shall forfeit that claim, and pay an equal fine.

It should not be argued, from the coincidence of this text of CÁTYÁYANA, cited in the *Mitácshará*, that a fine equal to double the sum intends the forfeiture of the sum claimed, and an equal fine. Were it so, the fine would not be double, since one of the constituent parts *of that multiple* would have no existence. The last hemistich in the text of YÁJNYAWALCYA must be understood as relating to the conscious exhibition of a false claim. Accordingly,

268.

YAMA declares:—If a rich debtor, through dishonest perverseness, pay not his debt, the king shall compel him to discharge it, and may take from him twice the sum *as a fine*.

Therefore, exacting from the debtor twice the amount of the debt as a fine, the king shall compel him to pay it, namely, the debt; for that must be supplied. But if he begin by denying the debt, though conscious of owing it, and afterwards, being brought into court, acknowledge the debt before the writing or other evidence be produced, he shall only be fined in a sum equal to the debt; for half the fine in question is ordained when *the defendant* himself acknowledges the debt.

269.

VYÁSA:—After denying the claim, should the party himself acknowledge the due, it is considered as a *tardy* acknowledgement, and the fine ordained is half of that *which is imposed in the case of obstinate denial.*

Of that fine which is imposed in the case of obstinate denial. By parity of reasoning should he acknowledge it in court upon reflection, though previously unconscious of the debt, the fine shall be half the debt in question.

This text of YÁJNYAWALCYA, though not inserted in most copies under the title of Loans, is inserted in this place, because it has been quoted by CHANDÉSWARA, and corresponds with texts of MENU and others.

270.

VYÁSA:—The claimant shall pay twice the sum for which he preferred a false claim:

2. The rule shall be the same in respect of either party who may be confuted, if a consideration be *specially* pleaded; and likewise in respect of either party who may be cast, should a former decision be alleged.

"A consideration;" a special cause. The *Retnácara*.

The following text explains a special cause:—

271.

NÁREDA:—When the defendant acknowledges the *receipt of the* sum, as declared by the plaintiff, but alleges a consideration, it is deemed a special plea *(pratyavascanda)*.

The defendant, or debtor, acknowledges the receipt *of the sum*, but answers, "it is true I received the money, but it was given by thee as a gratification for the accomplishment of thine own business." In this case also the rule is the same; either party being cast, whether he be claimant or defendant, shall be fined in twice the amount. For instance: at the close of the suit, if the gift of the sum as a gratification be proved, the claimant shall be fined in twice the amount; if the debt be proved, the debtor *shall be fined in the same amercement.* CÁTYÁYANA has explained *the plea of* prior decision.

272.

CÁTYÁYANA:—If a man, though cast at law, revive the suit, he should be considered as one previously confuted, and is called an appellant from a former decision *(prúnnyáya)*.

For instance: a creditor cast in a suit formerly instituted before one umpire, again declares before another judge, "this man is my debtor." That claimant should be answered by the defendant with this plea; "he has been already cast by me:" and that plaintiff is called an appellant from decision, or one whose suit has been already decided. In that case, whoever is cast shall be fined; whether the claimant be cast or the defendant, in consequence of the former decision appearing to be unjust, or on other grounds. "Likewise;" that is, he shall be fined in double the sum.

273.

MENU:—A debt being admitted by the defendant, he must pay five in the hundred *as a fine to the king*; but if it be denied, *and proved,* twice as much: this law was enacted by MENU.

This text is expounded by CULLÚCABHATTA, CHANDÉSWARA, and others, as relating to fines. Consequently, a debt being first disowned, but afterwards voluntarily admitted by the debtor, on his being merely brought into court, he must pay an amercement of five in the hundred, or a twentieth part of the debt. But if it be denied, and the debtor persist in disowning it even in court, and if it be proved with much trouble by a writing or by the evidence of witnesses or the like, *he must pay* twice as much, or ten in the hundred. CULLÚCABHATTA concurs in this exposition.

On the subject of the first hemistich, NÁREDA propounds a law:

274.

NÁREDA :—But if a rich debtor, through dishonest perverseness, pay not his debt, the king may take only a twentieth part of the sum, *if circumstances be very favourable to the debtor, or if he acknowledge the debt in court.*

That sum which a rich debtor withholds through dishonest perverseness the king shall compel him to pay to his creditor, and may himself take as a fine a sum amounting to a twentieth part of the debt: and this must be understood when the debtor voluntarily confesses the debt in court; for it corresponds with the text of MENU ordaining five in the hundred.

And this alternative in respect of moderate fines should be regulated by the qualities of the debtor, his class, and his circumstances.

The *Retnácara.*

On the subject of the last hemistich, YÁJNYAWALCYA propounds a rule :

275.

YÁJNYAWALCYA :—A debtor shall be forced to pay to the king ten in the hundred of the sum proved against him; and the creditor, having received the sum due, must pay five in the hundred *towards defraying the charges of judicature.*

The sum being proved, the debtor shall be forced to pay ten in the hundred as a fine to the king, making good that amercement out of his own funds. The very same gloss is delivered in the *Dipacalicá ;* and this must be acknowledged as the opinion entertained by the author of the *Mitácshará.* It concerns the denial of a debt; for it coincides with the text of MENU, "if it be denied, twice as much" (273).

The last part of the text of YÁJNYAWALCYA conveys this sense; the creditor also, having recovered his debt awarded by the king, must pay five in the hundred or a twentieth part to him as wages, *or towards defraying the charges of judicature.*

A man, subject to amercement under these texts, shall be forced to pay double the debt, a sum equal to the debt, or ten in the hundred, the fine being mitigated according to the degree of virtue he possesses, or other circumstances taken into consideration. This is declared. But if the debtor, coming into court, confess the debt, he shall only be forced to pay half as much. This is also declared. Consequently a priest, a virtuous soldier or the like, and a very indigent debtor, must pay five in the hundred; but if he persist in his denial even in court, ten in the hundred; for this conduct is supposed to be preceded by knowledge of the fact: but if he were unconscious, half as much. In general, a rich soldier and the like shall be fined in a sum equal to the debt, or in half that amercement, according to circumstances as abovementioned, if he deny the debt through ignorance; but twice as much if he were conscious of owing the sum.

On this subject CHANDÉSWARA has said in his gloss on the last hemistich of the text (273), 'he shall be fined in twice as much as is the amount of the debt.' That is liable to objection; for it would be a vain repetition of the double sum mentioned in another text of MENU (265.)

In like manner should the various fines on the creditor, in the case of a false claim, be regulated according to class and so forth. NÁREDA mentions a distinction in respect of the servile class :

276.

NÁREDA :—Should the sons of twice-born men, by women of the servile class, advance false claims, let the king cause their tongues to be drawn *forth* and pierced with a sharp instrument.

As for the following opinion, we think, it appears inadmissible, because it is unauthorized by CHANDÉSWARA, VÁCHESPATI, ŚÚLAPÁNI, CULLÚCABHATTA, and BHAVADÉVA.

The phrase in the text of YÁJNYAWALCYA (275), which is explained "shall be forced to pay by the king," being adduced in reply to the question arising on the preceding text (278),* 'by whom shall he be forced to pay his debts in the order in which they were contracted?' there is in fact a *necessary* repetition. Or the first text (278) relates to the case of two or more creditors, but this text (275) supposes the case of a single creditor. Hence the creditor, having received the sum due, must pay five or ten in the hundred, since it is a rule, that 'an alternative is admitted in law, if a question can be proposed, *which is thereby satisfied*;' he must pay either five or ten in the hundred: such is the alternative, and that is settled in practice. For instance; if the creditor must pay five in the hundred when the debt is confessed to be due, *then*, should the debtor confess it in court, but, through dishonest perverseness, pay it not, the king, enforcing payment, shall take from the creditor, towards defraying the charges of judicature, five in the hundred, that is a twentieth part of the debt, as directed by MENU, YÁJNYAWALCYA, and NÁREDA, concurring in the same precept (273, 275 and 274). If the debt be denied, and the defendant plead in the king's court, "I owe nothing," the king may exact twice as much or ten in the hundred, that is a tenth part, as authorized by MENU and YÁJNYAWALCYA (273 and 275): and the expression in the text of YÁJNYAWALCYA, "of the sum proved or recovered," is properly put in the fifth case: and the terms, "through dishonest perverseness," in the text of NÁREDA, are also pertinent; for, on any other construction, there could be no fine of a twentieth part imposed on the debtor; and it would be improper to exact *no greater fine than* a twentieth part, since he is stated as acting wilfully, through dishonest perverseness. What then is the import of the following rule of VISHNU; for he mentions, as a fine, the tenth part *to be paid* to the king?

277.

VISHNU :—If a creditor sue before the king, and fully prove his demand, the debtor shall pay, as a fine to the king, a tenth part of the sum proved; and the plaintiff, having received the sum due, shall pay a twentieth part of it *towards defraying the charges of judicature.*

This can be no objection; for CHANDÉSWARA describes, as a secondary fine, the sum which must be paid by the creditor: 'although the creditor be void of offence, the king may exact, as a fine, a twentieth part of the sum for

* In the code of YÁJNYAWALCYA, the verse 278 immediately precedes the verse 275. (See YÁJNYAWALCYA, ch. II, v. 41 and 42.)

enforcing payment of it.' Consequently the debtor must pay the sum in the presence of the king, and discharge the debt due to his creditor; and the creditor, having received his due, must pay, as a fine, the tenth or twentieth part of the sum: such is the construction *according to this opinion.** But we hold it proper to reject this interpretation, for the reason abovementioned.

Others quote the *Dípacalicá*, that 'the various fines should be regulated by other texts of law, according to the existence or non-existence of an unmitigated offence.' From a creditor of the priestly class, five or ten in the hundred cannot be taken without offence; for it is declared by MISRA, that the property of a priest should on no account be taken by the king; and it is forbidden in the *Mahábhárata* when treating of the duties of kings, and on other occasions, to take wealth from *Bráhmanas*. But punishment may be inflicted on *Bráhmanas*; for the punishment of *mutilation, such as* cutting off the hand, is mentioned in the dialogue between SANC'HA and LIC'HITA contained in the *Mahábhárata*; and the jewel which he wore on his head, was taken from AŚWAT'HÁMAN: accordingly the gem yielded by AŚWAT'HÁMAN, is mentioned in the first book of the *Mahábhárata*.

The *Srì Bhágavata*:—*Ignominious* tonsure, confiscation of effects, and banishment from the realm, are the punishments of reputed priests;† no other corporal punishment, *or pecuniary penalty*, is allowed.

"Tonsure;" shaving the hair. "Confiscation of effects;" seizure of property. "Banishment from the realm;" expulsion from the country. This has been sufficiently explained; and it has been *here* mentioned merely for the sake of illustration.

In a matter of debt, or the like, the demand should be proved by the evidence of witnesses and so forth; but if that be impracticable, by ordeal: if popular proof can be obtained, there shall be no recourse to ordeal. This will be elucidated under the title of Administration of Justice.

Should there be many creditors of the same debtor, to whom shall his due be first paid, to whom last?

278.

YÁJNYAWALCYA:—A debtor shall be forced to pay his creditors in the order in which the debts were contracted, after first discharging those of a priest or of the king.

273.

A debt being admitted by the defendant, he (the plaintiff) must pay five in the hundred; but if it be denied, twice as much.

274.

But if a rich debtor, through dishonest perverseness, pay not his debt, the king may take only a twentieth part of the sum *from the creditor*.

275.

A debtor shall be forced to pay by the king: and out of the sum proved and recovered, the creditor, who receives his due, must pay ten or five in the hundred, *according to circumstances*.

* To understand the comment, it may be requisite to state the texts as they would be translated were this interpretation received.

† Literally, kinsmen of BRAHMA; by which must be understood priests by birth, yet not strictly observing the duties of their class.

On the competition of several creditors, a *Bráhmana*, a *Cshatriya*, and so forth, the debt of the *Bráhmana* shall be first paid; and afterwards the rest in their order, as they were contracted: that is, the sum which was first lent shall be first paid, that which was next lent shall be next discharged: such is the sense of the text. The debts shall not be liquidated by a distribution of proportionate shares of the debtor's assets; nor shall the priority or subsequence of the debt due to the *Bráhmana* be examined: for the law does not direct it. But, should there be several creditors of the priestly class, the order in which the debts were contracted must be admitted.

On the competition of a *Cshatriya* and a *Vaisya*, the debt of the *Cshatriya* be first paid, and next that of the *Vaisya;* for YÁJNYAWALCYA says, "after discharging those of the king."* Again; on a similar competition of a *Vaisya* and a *Śúdra,* the debt of the *Vaisya* shall be first discharged, and next that of the *Śúdra.* In like manner, should a triple succession be admitted in regard to creditors of mixed classes, ranking in three degrees, highest, middlemost, and lowest: and should a creditor of the servile tribe claim with one of a mixed class, the same should be understood according to circumstances *of relative precedence.*

On this subject CHANDÉSWARA says, 'should there be at once creditors of various classes, the priest shall be first paid, and next the soldier and the rest; but if the creditors be of the same class, the debts must be paid in the order in which they were contracted.' By saying, 'if they be of the same class,' it is evidently meant that the order of the classes should be taken, if many debts be due to men of different classes. The same meaning is expressed in the gloss of the *Mitácshará:* 'if the creditors be of equal 'class, the debtor shall be compelled by the king to pay the debts in the 'same order in which they were contracted; but if there be variance of class, 'in the order of *the classes,* sacerdotal and the rest.' For "the order in which the debts were contracted," is there applied to the case of equal class; and the order of classes, sacerdotal and the rest, is there prescribed in the case of unequal class. There is no difficulty in supposing the same meaning in the gloss of the *Dipacalicá:* 'should there be more creditors than one, the 'debtor shall be forced to pay the debts in the order in which they were con-'tracted; *but* if there be at once creditors of the priestly and military class, 'and so forth, he shall be forced to pay the sums due to the *Cshatriya* and 'the rest, after first discharging the debt of the *Bráhmana*, even though last 'contracted.'

279.

CÁTYÁYANA:—If there be many debts at once, that which was first contracted shall first be paid, after those of a king or of a priest learned in the *Véda.*†

"Of a priest learned in the *Véda;*" after the death of a *Bráhmana.* "Of a king;" of a *Cshatriya.* This text is also intended to show a case of preferrable payment in the order of the classes. It must therefore be understood in the same sense as abovementioned.

* Which may be understood generally of the Military class.

† "But when the effects are few, the creditors numerous, and the debtor is sold into slavery, all shall receive *their shares of* the price, in proportion to their just demands, because there are not assets." I cite this passage from the *Vivádá Chandra,* because it contains a rule affirmed by the *Mait'hila* school, and extended to the case where the debtor's effects only are sold.

280.

CÁTYÁYANA:—If all the contracts were written in one day, the debts, payment, subsisting demand, and interest, shall be equal; otherwise, in order of time.

From the expression "in one day" it appears that no account should be taken of the priority and subsequence of several debts contracted on the same day; else the text would be nearly unmeaning. Consequently, the construction of the phrase is this: if the contracts were written in one day, that is, of debts contracted with many persons were reduced to writing in one day, payment, subsisting demand, and interest, shall be equal in respect of those debts. Therefore, collecting all the assets of the debtor, which are forthcoming, the creditors should divide them in shares proportionate to the amount of their respective debts. A distribution of shares proportionate to the amount of the debts may be thus exemplified: ten *suvernas* are due to one, two to another, and four to a third, but the assets of the debtor amount to eight *suvernas* only; in this case half a *suverna* shall be received for each *suverna*; and he to whom ten *suvernas* are due, shall receive five *suvernas*; he to whom four *suvernas* are due, two *suvernas*; and he to whom two *suvernas* are due, one *suverna*. But it must be understood, that in this case the principal and interest are added together. Hence, if one have a claim for interest specially stipulated, or the like, and the other for legal interest only, the interest being unequal, the payment to each shall be regulated by the interest receivable by him. But if some part of the interest have been received by any one creditor, that shall not be required from him, but it shall be deducted from his debt. However, in the case of interest by enjoyment, the principal only shall be admitted in the account. For instance: the principal sum amounts with interest to ten *suvernas*, and two *suvernas* have been received on a former day; the *remaining* eight *suvernas* only shall be admitted on a subsequent day, when a dividend is made: the two *suvernas* received on a former day shall not be confounded with the debtor's assets, for that debtor has no title to money actually received by the creditor. But afterwards he shall not have enjoyment of the whole *pledge*, for the debt is lessened in comparison with the former due. Nor shall the creditors divide that pledge, since it is possessed by one creditor alone. In fact, the creditor, who has received a pledge to be used, shall not receive a share of the dividend; for he has trusted to the chattel possessed by him for the recovery of his debt. He also who has a pledge for custody in his power, such as a copper caldron or the like, shall have no share of the dividend; but he may demand the sale of the pledge. Yet, if the debtor or any other person say, "this man has in his possession a chattel belonging to the debtor, let it be sold and shared by all the creditors," that shall not be done; for the debtor cannot sell a chattel possessed by the creditor, and the debtor's title *to the pledge* is at that time limited. It is the same also in other cases. In short, ascertaining and writing down the debts of all *the creditors*, with the interest due on them, a distribution of the debtor's assets should be made.

All this should only be done when the term has elapsed. Hence, if debts be contracted with several persons in one day, and the term of one loan be two years; of another, four years, of a third, five years: in this case, should a distribution be made at the close of the fourth year, no dividend shall be received by him who claims under a contract for the term of five

years; for his claim is weaker, since the term is unexpired. If he be so fortunate as that the debtor should survive and acquire wealth, then shall that debt be discharged. Should a further distribution of assets be made after the expiration of the fifth year, he shall receive an equal dividend in proportion to the debts then due: the whole assets, or a larger share, shall not be received by the creditor, who received no dividend at the former distribution; for no law ordains it. This and other points may be argued.

But if the debts of all the creditors be not fully discharged, they may preserve their claim for the remainder. This also must assuredly be proportionate to the *original* debts, *since the dividend was so.* Therefore the legislator adds, "subsisting demand," or literally preservation; the term is synonymous with the owing of the debtor.*

If the debtor's assets only suffice for the discharge of interest due to all the creditors, or to any one of them, then interest only shall be received, but the principal shall bear no further interest. However, when, in consequence of a term having been stipulated, a distribution of assets is made before the period which would regularly double the debt, it may bear further interest after the dividend. Therefore the Sage adds "and interest." It is *also* the practice, for a creditor not to accept *payment of* his principal while interest remains due. It follows, that, if debts had been contracted with two or more creditors on one day, a preference being then disallowed, if the debtor cannot fully discharge all the debts, whatever assets are found, shall be taken by all the creditors, and their further demand may be retained; or the interest may be received, *and the principal remain due.*

This may be observed; if he, by whom no term was stipulated, demand the debt, a dividend shall be paid to him; if he do not demand it, but the period in which a debt is doubled be past, the debtor should call him and pay the sum. In like manner, should the term of any man's loan be expired, the debtor should call him. But, if any creditor be absent in a foreign country, his dividend should be deposited with a confidential person. Such is the full meaning of the law.

The following text propounds a distinction:

281.

CÁTYÁYANA:—That capital on which it is proved that the assets were gained, and no other debt, must be repaid by the debtor *out of those assets.*

If there be at once many creditors of the sacerdotal and other classes, he through whose loan the assets were gained must be paid out of those assets; not any other creditor. Should a surplus remain, it shall be paid to the other creditors, by a dividend, or in the order of classes. For example: borrowing a sum from one man, and therewith paying the revenue which is due to the king by the custom of the country, or supporting his own dependants and the like, the debtor conducts agriculture; the produce of that culture is applicable to the payment of the debt due to that creditor alone. But if he borrow money from another man, and during the season of culture perform other work to avoid idleness, that loan must also be considered as applied to

* This exposition appears unsatisfactory; *racshan'a* is synonymous with *d'háran'a*, in some senses, not in all. Sir W. JONES translated it "profits of a pledge or the like." Nevertheless, I follow the gloss.

husbandry, *which was his chief employment*: and such is the practice. But a debt contracted for the charges of celebrating nuptials or the like, even though it be contracted on the same day, constitutes a weaker claim in respect of wealth acquired by agriculture, since it was not applied to that purpose.

Again; in the case of commerce and the like, assets gained by traffick, and similar means, are applicable to the payment of the creditor claiming a debt contracted for the purchase of goods, for the discharge of the king's duties, for the maintenance of servants, and so forth. In like manner, borrowing a sum from one man, he redeems a pledge hypothecated to another; in that case, should the debt remain undischarged, he must deliver or sell that pledge for the payment of that creditor and no other: he has no right to pledge the chattel to any other man. Again; a husbandman cultivates land belonging to a certain person; and the landlord borrows money from the husbandman, or the husbandman from his landlord; in either case, the debt of that creditor alone shall be discharged out of the grain produced from that land: for those assets, consisting in grain, were produced from that capital, whether land, or seed and plough. Such is the consistent method of CHANDÉSWARA and the rest.

However, should he deliver those assets to another person through mistake, or hypothecate that pledge to another creditor, the act is valid; for the assets were the property of the debtor. Nevertheless, the creditor may forbid it; and if the debtor slight that opposition, he shall be fined. In like manner, even though unopposed, if he do so deliberately, he shall be fined; for the reason of the law is the same. This should also be argued in the case of payment *to a favoured creditor* neglecting the order in which the debts were contracted, or the order of classes.

Here a question occurs for consideration. If the landlord or the husbandman abovementioned first borrowed money from another, pledging to him the produce of the land for that year, and afterwards receive a loan from the husbandman or landlord, in that case—who shall be paid out of that produce? To this question it is answered, the whole shall not be paid to the last creditor; for, were it so, there could be no such practice in money-lending as that of pledging the produce of land owned or cultivated by another; nor *shall it be paid* to the first creditor, for the text would be almost unmeaning, since no loan would be made without a pledge, lest a subsequent hypothecation *invalidate the prior lien.* To this it may be replied, since the subsequent loan had not taken place when the pledge was made, there can be no such lien on the land; the hypothecation is therefore valid, and a subsequent loan cannot annul the valid hypothecation, and establish such a lien: it is therefore reasonable that the debt of the mortgagee should alone be discharged. However, the second creditor resists the disposal of the produce until his own debt be paid. This many excellent persons maintain. We hold, that an hypothecation subsequent to such a debt, *which gave a lien*, is not valid; and the text therefore is not unmeaning. But some lawyers say, the text of CÁTYÁYANA (281) should be otherwise applied. A lien immediately arises on that produce, similar to a pledge; since there is no authority for a reference to the *time of* contracting the debt. Hence the last creditor should alone be paid. But if the mortgagee, *at first* declaring, "I will not lend the sum," *at length* accepts the pledge with the assent of the other party, the hypothecation is valid.

The distribution *of dividends* should be made in the presence of the king's officers, or of arbitrators, to remove the apprehension of unmitigated offence; the debtor should not make the distribution in the privacy of his own house. This has been sufficiently discussed.

282.

YÁJNYAWALCYA:—When the debtor has paid the debt, let him cause his writing to be torn, or another to be made as his acquittance; but a debt contracted before witnesses, must be discharged before witnesses.

When the debt is fully discharged, let the debtor cause the writing to be torn: but if the note be missing, let him cause another writing to be made as his acquittance. A debt contracted before witnesses, he should discharge before witnesses. The *Dípacalicá.*

He should cause the writing to be so torn, or cancelled, that it may not be again produced on another occasion. But if the writing were attested, the payment should be made, and the deed cancelled, before witnesses; for such is the import of the text, "a debt contracted before witnesses, &c." else it might be suspected that the debt was undischarged. "As his acquittance;" the term is in the seventh case, with a causal sense. Let him cause another writing to be made; namely, that which is denominated a written discharge or acknowledgement of payment. This also should be attested, or be made in the creditor's own handwriting; as suggested by a text cited in the *Vyavahára tatwa*, and already quoted in this work (13).

The form of the writing should be regulated by the established custom of the country, and it has been already mentioned in the discussion on written contracts of debt: the very same form should be admitted in the present case; for it is directed generally, that "whatever contract shall have been concluded by mutual consent," a written memorial of it should be executed in that form (16). But, since that text is placed under the title of Loans and Deposits, the name of the lender or owner is directed to be first inserted in the writing: here the reverse should be done; for the word lender there intends the person whom the obligation regards; that is, him to whom the writing is delivered. Hence, in a deed of gift, the name of the donee *should be first inserted;* or in a bill of sale, the name of the vendee. This and other points may be argued. But in fact, says a certain author, the debtor is at that time an owner *delivering his own;* for he differs in nothing from one who delivers property. Hence the variation consists in this; that the debtor's name should be first inserted, because the debtor is the person whom the obligation regards. The creditor should sign his name on the top of the writing;* for the word "borrower," in the text of YÁJNYAWALCYA (16), intends the person who executes the writing. This and other points should be understood.

283.

VISHNU:—A debt contracted only before witnesses, may be discharged before witnesses only; *but,* a written contract being fulfilled, the writing should be torn.

* There is an inconsistency in regard to the place of sig nature, which I cannot well reconcile.

"Before witnesses only;" else, if the payment be unattested, how can the debtor prove that payment, when the creditor subsequently sues before the king for the debt proved by verbal or other evidence?

284.

NÁREDA:—Let the creditor give a writing after the debt has been acquitted; or, if that cannot be, let him make a *publick* acknowledgement: this shall be a mutual acquittance of the creditor and debtor.

Let him give a writing, that is, a written discharge, if the note be not at hand. "After the debt has been acquitted;" after it has been fully discharged. "A publick acknowledgement;" a declaration made before *unconcerned* persons, that the debt has been paid by this man. The *Retnácara.*

Consequently, if a written acquittance cannot be given, the payment should only be made before witnesses. Should no writing be given, nor attestation made, the debtor might complain before the king, *in these words*, "he has exacted from me more than was due;" or, "he refuses to give a receipt." Hence the creditor also would need an acquittance; it is therefore said, "*a* mutual *acquittance or release.*"

When the whole sum is not paid, but a part only, how should the bond be cancelled? For this cause YÁJNYAWALCYA adds *the following rule*:—

285.

YÁJNYAWALCYA:—If the debtor pay by little and little, let him write the sums paid on the back of his written contract, or let the creditor give a receipt signed by his own hand.

"A receipt;" a written acknowledgement of a sum received.

The *Retnácara.*

Let him write, "Such a sum this day received by me, in part hereof, from such one, the debtor." But the form must be regulated by the *current* practice alone. In his receipt should be written the sum which is paid, and the date on which that very sum is paid: he may subjoin sums previously received. Thus, he should write, "so much money received this day, such sums received earlier, making in all such a sum *received to this date.*" Else, through the forgetfulness of his creditor, the debtor might in course of time obtain several receipts for a single payment; or, although that have not been done, the creditor might allege that it was done. This distinction appears admissible in our apprehension.

From the phrase "let the debtor write the sums paid, &c.," it appears that the debtor alone should write the sums paid by himself on the back of the written contract: but the receipt should be written by the creditor; for the phrase "signed by himself" may be properly referred to the creditor.

286.

VISHNU:—Part only being paid, and the writing not being at hand, let the creditor give an acquittance written by himself.

" Part only being paid ;" the whole amount of principal and interest not being fully discharged ; (for instance, a distressed debtor, unable to pay the whole sum at once, pays it by little and little, from time to time :) in this case, the debtor should write the sums paid by him on the back of the written contract ; or, the deed not being at hand, the creditor should give another writing to this effect, " this sum has been received by me." Such is the sense.

But if the writing be not at hand, then, even if the whole due be discharged, the creditor must give a writing signed by himself ; therefore does the legislator express, " and the writing not being at hand." Or the noting of partial payments on the back of the bond, as mentioned by YÁJNYAWALCYA, and the acquittance signed by the creditor himself, as mentioned by VISHNU, admit of two cases : if the writing be, or be not, at hand, and the debt be fully or partially discharged, the creditor should give an acquittance signed by himself. Herein CHANDÉSWARA concurs : or the exposition may be thus ; if the writing be at hand, and a partial payment be made, it should be noted on the back of the bond, and a separate receipt should be also given, agreeably to the texts of both Sages. Should the creditor subsequently affirm, " this debtor obtained the writing by artifice from my house, and has written sums on it though never paid," that assertion may be easily confuted.

If the creditor produce not the writing, nor give one signed by himself for a sum received, what shall be done ? On this subject NÁREDA propounds *the following text :—*

287.

NÁREDA :—Having received a sum, the creditor should give a receipt to the debtor ; but he who refuses, when required to give *back* that *for which he granted no receipt,* shall forfeit the remainder of the debt.

" Having received" the interest ; such is the meaning. He who refuses *both* to *give an acquittance and* repay the interest when demanded, &c.

The *Retnácara.*

" Interest" is here supplied. The term signifies the interest of the debt. But, in fact, that is merely intended for elucidation ; the real sense is an incomplete payment. The use of supplying that term is this : when a part of the principal has been paid to the creditor, and he neither gives up the writing, *that the payment may be noted,* nor grants a receipt ; in that case, even though the creditor may be disposed to repay it, the debtor does not demand the sum paid ; for, *were it repaid to the debtor,* the sum would bear further interest from that day. Should a creditor, who has received a sum from the debtor, neither permit him to write the sum paid on the back of the contract, nor give the debtor a receipt signed by himself, surely the debtor will re-demand the sum paid by him *as interest ;* if the creditor also refuse to restore it, he shall forfeit the remainder of his debt. The forfeiture of the balance is, as it were, a fine on the creditor for that offence.

288.

VRĬHASPATI :—If he who has recovered his debt by the mode of moral duty, or any of the others, refuse to write a receipt on the note, or to give an acquittance, the sum that was due shall be forfeited.

That creditor who has enforced payment of his debt by the mode of moral duty, or any of the others abovementioned, but will not permit the debtor to write the sum paid on the back of the note, or, if this were impracticable, who refuses to give a receipt, which is the next step, *shall incur this forfeiture.* 'Through knavery' should be supplied in the text. It also intends attestation, as mentioned by NÁREDA: the full meaning is, if he also refuse an attestation of the payment. In these cases, the sum due to the creditor would be forfeited; the mood is potential. Because the sum which has been actually paid cannot be proved by the debtor without a writing or other evidence; hence, since he may be liable to pay it again, the creditor may possibly receive more than his just due: such is the sense of the text. Consequently, over-exactions being improper, nothing should be done which tends thereto. But if any one do that which ought not to be done, he shall surely be punished. This is intimated in the text of VRĬHASPATI. It is therefore absolutely necessary to write the sum on the back of the note, or grant a receipt or the like: such is the full sense of the text; and punishment consists in the forfeiture of the balance, as ordained by NÁREDA. Since no law directs it, the fine shall not be received by the king. This exposition of the text of VRĬHASPATI, though not delivered by any *former* author, seems elegant.

Here the term employed (*vrĭddhi*)* signifies loss or forfeiture.

The *Calpateru.*

For the verb *vardh* is inserted in the *Ganacámadhénu*, with the sense of fill, and cut; and this word is derived by the substitution of *vrĭdh* for *vardh*, *a change* which often occurs with this suffix. Or the verb *vrĭdh*, representing the verb *vardh*, as well as its own regular sense of growth or increase, through that medium presents the secondary sense of abscission, which is the regular meaning of the verb *vardh*; as the term *dwirépha* (two rs.) signifies a black bee, through the medium of the word *bharmara* (which contains two rs.); and the verb *ás*, sit, preceded by the particle *upa*, signifies adoration or worship, in the following verse of the *Cusumánjali*, a treatise of philosophy:†

He, the Supreme Spirit, is here described, the worship *(upásti)* of whom wise men consider as the road to heaven and final beatitude.

Consequently, if the creditor, through knavery, do not permit the sum to be written on the note, nor give a receipt, nor cause his acknowledgement to be attested by witnesses, he shall forfeit the sum that was due, namely, the sum lent by him: and the forfeiture must be understood, as in the text of NÁREDA, to be the forfeiture of the balance.

The *Cámadhénu* and HELÁYUDHA read *násau vrĭddhim avápnuyat*, he shall not receive advantage, instead of *tasya tad vrĭddhim ápnuyat.* HELÁYUDHA says in his gloss: 'if the creditor, having received a small part *of the* '*debt*, do not suffer the sum to be written on the back of the note, nor give 'a receipt, then, since he forfeits the remaining sum, he receives no interest 'or advantage on it; for that is prevented by the forfeiture of the balance.' In effect there is no variance between the *Calpateru* and HELÁYUDHA.

* Taking the word in its usual acceptation of interest, Sir WILLIAM JONES translated the text, "the debtor shall gain the interest that was due."

† By UDAYANÁCHARYA, a treatise written to prove the existance of GOD, contested by the Atheists of his day.

The refusal to write a receipt, or give an acquittance for the sum paid, must be understood as arising from an intention of obtaining a second payment of the same sum: for, otherwise, there would be an inconsistency.

The *Retnácara*.

'Do not suffer the sum to be written on the note;' "by the debtor" should be supplied.

The creditor lends money solely for the sake of gain; and by that gain or interest he receives an advantage on his principal. Should even the remaining principal be forfeited, how can he obtain advantage from the principal sum? Consequently, by declaring that he has no advantage from the sum due, the forfeiture of the remainder is, in some sort, indirectly suggested; since the text coincides with that of NÁREDA. 'For that is prevented by the forfeiture of the balance;' this is a repetition intended to suggest the penalty as the *immediate* cause of *his* obtaining no advantage. Or that gloss may be read, 'for the forfeiture of the balance is the subject treated;' that is, it has become the subject through the text of NÁREDA. 'He shall not receive advantage,' suggests the penalty of losing the remaining sum; therefore does the commentator say, 'for the forfeiture of the balance is the subject, &c.' Such is the exposition of the *Calpateru* and HELÁYUDHA.

According to the *Cámadhénu* the forfeiture of interest only is mentioned; not the forfeiture of the remaining principal. But in fact, according to this opinion, the sense so far explained must be further extended to the same purpose: else there would be a contradiction, repugnant to reason, in the forfeiture of the balance when a creditor has casually written no receipt or given no acquittance, but without intending to obtain a second payment of the same sum, *while on the other hand a less penalty fell on a wilful offence*. Consequently the text of VRĬHASPATI has the same import with that of NÁREDA, according to the gloss of HELÁYUDHA and the rest. Like mutilation and other punishments *for other offences*, the forfeiture of the balance is the punishment for the offence of refusing to write a receipt and so forth.

Some interpreters hold, that even on the other reading (*ne chaivópagatam dedyát tasya tad vrĭddhim ápnuyat*) the text may be explained in its literal sense, consistently with the gloss of the *Calpateru*, as denoting a forfeiture; while the word *vrĭddhi* retains the sense of gain, for the last negative is connected with the word "*ápnuyat*, may obtain," and the former negative (in the preceding hemistich) is connected with the word "should write," as well as with the word "*dedyát*, should give."

But the text is thus expounded in the *Párijáta*: 'that sum which has been paid by the debtor to the creditor, shall obtain interest; that is, it shall carry interest.' Consequently, as the sum lent by the creditor shall be received back from the debtor with interest thereon, so shall a sum which has not been written on the back of the note, or for which no receipt has been obtained, be received back by the debtor from the creditor with interest thereon. This is stated by the Sage.

The creditor's motive may be generous. Thus a thousand *suvernas* were originally received by the debtor from the creditor, and five hundred *suvernas* have been subsequently paid, but not written on the back of the deed, nor any receipt given for them: in this case there is no forfeiture of interest on the thousand *suvernas* from the day when five hundred *suvernas* were paid, but interest runs on the five hundred *suvernas* from the day when they were paid, and that interest shall be paid by the creditor to the debtor.

At the time of settlement, calculating interest in favour of both, and deducting the sum paid by the debtor, with interest thereon, from the sum lent by the creditor, together with the whole amount of interest, the remainder only shall be paid by the debtor. The creditor sustains some loss by this adjustment. For example: On the sum of one thousand *suvernas,* interest at the rate of an eightieth part amounts in one month to twelve *suvernas* and a half, and accumulates in six months to seventy-five *suvernas:* should five hundred *suvernas* be paid by the debtor at that very period, and the debt be finally discharged at the close of the year, the payment made by the debtor has accumulated to five hundred and thirty-seven *suvernas* and a half, and the sum lent by the creditor has accumulated to eleven hundred and fifty *suvernas ;* and deducting therefrom five hundred and thirty-seven *suvernas* and a half, six hundred and twelve *suvernas* and a half are receivable from the debtor. But if the debtor wrote that sum as paid on the back of the note, or received an acquittance, interest amounting to seventy-five *suvernas* was receivable when the five hundred *suvernas* were paid: and, deducting that, four hundred and twenty-five *suvernas* only cease to bear interest; for so much only of the principal is discharged, and five hundred and seventy-five *suvernas* remain due out of the principal sum. Interest thereon for six months amounts to forty-three *suvernas*, two *máshas* and five *racticàs ;* adding this *to the remaining principal,* the sum due amounts to six hundred and eighteen *suvernas*, two *máshas* and five *racticàs*. The gain would therefore be five *suvernas*, ten *máshas* and five *racticàs ;* by rejecting which the creditor manifests generosity.

This, according to all opinions, can only be suitable when the agreement was made for interest payable at fixed periods. In some instances the debtor would sustain a loss. For instance: when stipulated interest has been fixed by the creditor at the rate of two *panás,* that interest is receivable by the creditor alone; but legal interest only shall be received by the debtor, since no other rate was expressly settled. When a sum is paid by the debtor in liquidation of the debt, further interest at the stipulated rate ceases, on the sum paid, from the date of payment: but when the sum paid carries separate interest, the debtor sustains a loss, since he obtains legal interest only, while the creditor obtains the stipulated interest. It may be argued similarly *in other cases* according to circumstances. With an ignorant creditor the motive may be dishonest. For instance; he will not allow the sum to be written on the back of the note, and refuses to give a receipt, apprehending, "if I accept this sum in liquidation of the debt, my interest will stop;" he is not aware that, if the sum paid by the debtor be received otherwise, it will bear interest. This and other points may be argued.

In this case, if more than the principal and interest have been delivered by the debtor to the creditor through some mistake or the like, then, calculating interest thereon, the debtor is entitled to recover from the creditor the excess above the principal and interest due; for the excess is similar to a debt due by the creditor. If the exact sum have been paid, but the period which limits interest receivable by the creditor be past, the debtor would be entitled, in that case, also to obtain interest on the sum paid by him: however, he does not exact it. All this should be understood in those cases only where the sum is delivered with a purpose, *which may be expressed in these words,* "this property shall remain for the present in thy power;" the debtor shall have no interest, since the sum delivered was similar to a deposit.

This and other points may be inferred from reasoning.

This method, authorized by the gloss of the *Párijáta*, is consistent with practice. According to this interpretation, a fine on the creditor is not propounded by VRĬHASPATI. But others explain the terms *of the text*, (which have been translated, "who has recovered the sum *or debt*,") in the apposition named *carmadháraya ;* "the sum recoverable, or of which payment might be enforced," that is, in other words, the remaining sums. It should therefore be written on the back of the note, or on an acquittance, "so much money this day paid, and so much remaining due." On failure of that, the further sum to be recovered, *or balance of the debt*, is forfeited; taking the word *vrĭddhi* in the sense of loss, in conformity with the gloss of the *Calpateru*.

Is not a forfeiture incurred by the creditor, then, only when the payment made by the debtor is proved, as well as the fact of its not having been written on the note? But if the creditor neither permit that to be written, nor give a receipt, how can the payment made by the debtor be proved? Still less can his refusal to permit the endorsement be proved. It should not be said, the fact may be proved by witnesses; for, if the creditor receive the sum in the presence of witnesses, he incurs no penalty, since he is guilty of no offence. To this it is answered, when the debtor, having paid a sum to his creditor, demands an acquittance or other acknowledgement, but the creditor attempts to delude him, saying, "I will give an acquittance *hereafter ;*" then the debtor, at that very time bringing other witnesses, shows the money lying before the creditor, or obliges him to acknowledge that "so much money has been paid by this man." His delusive promise of giving an acquittance, and that evidence, are both valid arguments of proof. In such a case only should the forfeiture of the remainder, as mentioned by VRĬHASPATI, be admitted.

In like manner, when the debtor pays a sum counted by a merchant, then the merchant proves the payment; the note wanting an endorsement is proof of no endorsement having been written, and the refusal to give a receipt may be established by the want of evidence to prove the delivery of a receipt. Again; some person, standing in another place, observes the whole transaction; he also is a *competent* witness. This and other *modes of proof* are mere examples.

But, if the debtor, through knavery or the like, neither accept a receipt, nor write the payment on the back of the note, then also, from parity of reasoning, the debtor incurs a forfeiture of the sum paid, though it have not been noticed in texts of Sages or commentaries of Authors. This we deem proper and consistent with reason.

What knavery can the debtor purpose, that he should be averse from obtaining evidence of the sum paid by him? Having paid ten *suvernas*, he will affirm that he paid twenty *suvernas :* afterwards, when a doubt arises from the want of proof, he says, "let this man take his oath ;" if the creditor, fearful of disrepute, refuse the oath, he loses his due: or, if he take the oath through love of money, the debtor would declare in various companies of worthy persons, "this man is dishonest; taking an oath, he has extorted from me a sum not justly due." This and other points may be argued.

Here an observation should be made. In all doubtful cases, a decision should be grounded on written documents or verbal evidence. If those documents be in the handwriting of another person, they are good evidence, provided they be attested, under a text above cited (13). But if all the witnesses be dead, the document should be collated with other *instruments in the* handwriting of the same persons.

289.

YÁJNYAWALCYA:—In a disputed case the document must be proved by the handwriting of the party or the like, by reasonable inference, by *evidence of* the contract *which the instrument records*, by a *peculiar* mark, by connexion *and dealings of the parties*, by *the contents of* the document, or by *previous recourse to* measures *for recovery*.

This document is not admitted by both parties; and it is questioned whether it have, or have not, been lately written by one party on paper to which the appearance of antiquity has been given by the application of mustard-seed or the like: in this case proof must be deduced from the handwriting of the party or the like. But if it were written by another person, it must be proved by the handwriting of him *who wrote it*. In the *Dipacalicá* "reasonable inference" is explained 'what seems reasonable in respect of that man, at this time, and in this place.' "The contract," such as the divesture of property or the like, proved by witnesses. "A mark," not generally used. "Connexion;" previous dealings of receipt and the like between the giver and receiver. "The document;" probably authentic for such a sum lent by this man. "Measures;" modes of recovery. By these proofs, namely, by the handwriting of the party, and the rest, let a contested document be justified. Under the term "or the like" is comprehended the handwriting of the witnesses or scribe.

290.

CÁTYÁYANA:—Should the handwriting of the debtor, whether living or dead, be questioned, the document must be collated with other instruments in his own handwriting.

"Reasonable inference," according to the preceding gloss, may be thus exemplified. This man's father deceased at that time; he needed a loan for his father's funeral rites, but obtained it from no other person; it is therefore reasonable to conclude that he contracted a debt with this creditor alone. This and similar points should be also argued in the case of gift and the like. It is affirmed by this man, that he sold a cow for the purpose of lending this money; "that is probable, *says a witness, for* I know that he did sell a cow at that very time.

"An uncommon mark;" the practice of using such a mark in writing may be evidence against the individual person, not against any other. Or the mark may be a plough, usually designed as a signiture by husbandmen; a wheel, by a potter; a particular weapon, by those who bear such weapons; and *a hand and arm*, a type of the thunderbolt, by certain persons, and so forth. "Connexion and dealings" are obvious. "*Contents of* the documents;" by the term here used, the written document is signified: it is probable that four *suvernas* may have been lent by this wealthy person to that indigent man; hence this document is probably authentick. "Modes of recovery;" for instance, if he were not indebted to this man, why did he promise, when formerly brought before the king, that he would pay after the lapse of seven days? Consequently, the previous recourse to measures for recovery, such as the mode of moral duty and the rest, removes the doubt concerning the writing.

"With other instruments in his own handwriting" (290); if the scribe say, "this was not written by me," he should be told to write another paper, and the document should be collated therewith, and that *of course* when the scribe is living; but if he be dead, it should be thoroughly examined by comparison with a former writing produced. Whether alive or dead, it is proper to collate it with his handwriting in a former document. This has been sufficiently discussed.

If by chance the writing be *carried* elsewhere before the debt be discharged, what shall be done? To this incidental question YÁJNYAWALCYA replies:

291.

YÁJNYAWALCYA:—If the instrument be *inaccessible* in another country, or written in a wrong form, or destroyed, or illegible, or stolen, or gnawed *by vermin*, or burned, or torn, the debtor must give another writing.

If the instrument exist in another country, whence it cannot be brought back, the debtor must give another writing. The recital should be thus: "having received a loan of such a sum, I gave a writing, and now give another document, because that has been carried to another country."

"Written in a wrong form;" being at first written, through ignorance, in a form contrary to law. "Destroyed;" by moisture or the like. "Illegible;" from the defect of the ink, and so forth. "Stolen," by robbers or others. "Gnawed," by insects or any vermin. "Torn," rent in two. *In these cases* another writing should be executed with the consent of both parties. The *Dipacalicá.*

A decision should be grounded on any one of the proofs mentioned; namely, evidence of the handwriting, and the rest; or on two or more arguments. If no such proof can be adduced, oath or ordeal must determine the contest. Consequently, on failure of documents, when a decision cannot be grounded on written evidence or similar proof, the legislator admits the oath of the party. The *Dipacalicá.*

And this must also be understood in the case of a bill of sale, or the like; for it is mentioned generally. All this is ordained when the debtor is living; but, if the debtor have deceased, what shall be done? To this VRÏHASPATI replies (121).

"Has absconded" (121, 2); is absolutely not to be found, having absconded or the like. "Notice having been given to the paternal or maternal kinsmen of the debtor, the creditor may seize and obtain his due" (121, 3; the last portion of which text is read, *tad bandhu jnyáti viditam pratigrïhann avápnuyát,* notice having been given for the assurance of that debtor's relations). The *Retnácara.*

But MISRA reads, *tad dhanam jnyátrï viditam pragrïhan náparádhnuyát,* and thus comments on it; 'the creditor, recovering his due by violence or the like, shall not be punished by the king.'

"He must relinquish the balance" (121, 2); he must deliver it to the heir of the debtor, or to the king; but the property of *Bráhmanas,* on failure of heirs, he must cast into the waters. These texts are otherwise expounded as relating to the title of Redemption of Pledges.

But if the creditor be dead, to whom should the debt be delivered? NÁREDA (231) replies to this question. That text has been already expounded.

"Those who are distant" (231); kinsmen, other than his offspring, and near kinsmen of the same race, but allied to his father or mother. "A creditor of the priestly class;" illustrative of every class.

The *Retnácara.*

It should be here noticed, that the precept for casting the sum into the waters regards the priestly class only; the king may take the property of others on failure of all heirs. If there be any legal heir, why should he cast it into the waters? In this exposition MISRA and others concur. "Bestow it on priests" (230); on learned and worthy priests: for it coincides with the text of DÉVALA above quoted.

An observation may be here made. If a man became surety for a debtor from whom he has received a pledge, should that surety die leaving no son, in whose possession ought the pledge to remain? To this question it is answered, if the receipt of the pledge by the surety be proved, it shall be delivered to the creditor; for the debtor was not trusted: and from that day the debt becomes one secured by a pledge; it shall therefore only bear interest at the rate of an eightieth part or the like. This and other points may be argued.

YÁJNYAWALCYA:—If a husband, in a famine, or for the performance of some indispensable duty, or during extreme illness, or while a creditor keeps him confined, should appropriate the wealth of his wife, he shall never, *while his distress lasts,* be compelled to restore it.

"Or while a creditor keeps him confined," while a creditor or other person becomes the occasion of his nourishment being suspended or the like.

The *Dípacalicá.*

From the mention of "husband" in this text, it follows, that the wealth of a woman, borrowed by any other person, must necessarily be repaid.*

The twenty topicks, comprised under the forensick title of Loans and Payment, have been thus briefly discussed.

* Some remarks on the subject of pledges, which were subjoined in this place, I have transferred to the Chapter on Pledges.

BOOK II.

ON DEPOSITS, SALE WITHOUT OWNERSHIP, CONCERNS AMONG PARTNERS, AND SUBTRACTION OF WHAT HAS BEEN GIVEN.

CHAP. I.

ON DEPOSITS AND OTHER BAILMENTS.

SECT. I.—*On the several Sorts of Bailment.*

1.

VRĬHASPATI:—Under the title of Loans and Payment, the law has been declared, from the delivery of the loan, and so forth, to the recovery of the debt: Now hear the complete rules for Deposits *and other bailments.*

"Delivery," or advance; delivery to a borrower asking a loan in these words, "lend me money:" of course *it means* the delivery of money *thus* becoming a loan. Beginning with this, and ending with compulsory payment, that is, with the recovery of the debt, the title of law, called Loans and Payment, has been promulged. The proper order of the subject is thus imitated; for MENU, enumerating the eighteen titles of law, has first mentioned Loans, and next Deposits: the pupil, therefore, is first required to study the law of Loans, and next that of Deposits, because it is next in order.

2.

MENU:—Of those *titles,* the first is debt on loans for consumption; *the second,* deposits, and loans for use; *the third,* sale without ownership; *the fourth,* concerns among partners; *the fifth,* subtraction of what has been given;

2. *The sixth,* non-payment of wages or hire ; *the seventh,* non-performance of agreement ; *the eighth,* rescission of sale and purchase ; *the ninth,* disputes between master and servant ;
3. *The tenth,* contests on boundaries ; *the eleventh,* assault and slander ; *the twelfth,* larceny ; *the thirteenth,* robbery and other violence ; *the fourteenth,* adultery ;
4. *The fifteenth,* altercation between man and wife, and their several duties ; *the sixteenth,* the law of inheritance ; *the seventeenth* and *eighteenth,* gaming with dice and with living creatures : these eighteen titles of law are settled as the ground-work of all judicial procedure in this world.

Among these eighteen titles of law, that of Loans and Payment is first discussed in this work. Its definition has been propounded by NÁREDA, (Book I, v 1). Bailment, consisting in the intrusting of ones own property with another person ; sale made by one who is not owner of the effects sold ; the mode of proceeding among associated traders and the like ; the resumption of effects giving away, believing of the donee an improper object of donation, or through anger or the like ; non-payment of wages, or of the hire of a servant or labourer ; breach of contract ; rescission of purchase, and rescission of sale ; disputes between master and herdsmen ; contests on the boundaries of towns and the like ; slander, or contumelious invective, and so forth ; assault or battery, and similar injuries ; larceny, or private stealing ; robbery, or violent seizure of property ; adultery, or intercourse of a woman with a man other *than her husband ;* duties of a husband with his wife ; distribution of the paternal estate or the like ; "gaming with dice," that is, play ; "gaming with living creatures," or fights of birds, rams, and other living creatures : these eighteen titles of law are the ground-work of judicial procedure. Challenges, or gaming with living creatures, being distinguished from other modes of gaming, the number of eighteen is completed. CULLÚCABHATTA.

Loans have been discussed ; sale without ownership shall be subsequently considered. What is ordained, is a "precept or rule" which must be fulfilled (1). Consequently, the meaning of the phrase (1) is, "hear, that is, attend to, what is to be done in respect of bailments ; namely, the form of making a deposit, and so forth, unto the form of receiving it." NÁREDA defines a deposit :

3.

NÁREDA :—Where a man bails any of his effects to another, in whom he has confidence, and from whom he has no doubt of receiving his property again, it is a deposit, which the wife call *nihcshépa.*

"Where" is here employed in the sense of 'when ;' one suffix being substituted for another. Or else, "where" has the termination of the seventh case, denoting subject ; consequently that in respect of which the agent, entertaining no doubts of receiving his property again, performs acts which make it a deposit, or an act amounting to bailment, is a deposit : or the settled rule concerning deposits is a title of judicial procedure.

It is the sense of the word grounded jointly on its use and derivation, or on its acceptation only? The latter is intimated by CULLÚCABHATTA, who thus explains the word, 'the intrusting of one's own property to another person:' and the author of the *Mitácsharú* says, '*nihcshépa* is the committing of property to *another* in *his* presence.' According to this opinion, it has a secondary sense, namely, that of *the thing* deposited, in the expression "make a deposit"* (11): for a derivative of this form may be admitted in a passive sense. When a man bails his own property, it is a bailment of his own property, or the property is a bailment. According to the opinion wherein it is maintained that the word means the thing bailed, the sense is the same in both texts: herein many authors concur. Consequently *nihcshépa* denotes generally both the delivery of a man's own effects to another without annulling his own property in them, and the effects so delivered.

"In whom he has confidence," is mentioned descriptively, and not as denoted by the term; for a man will not entrust his property to another without confidence in him. "Any of his effects;" any of the effects in his power: therefore, when the king commits contested property to another person, it is a deposit.

Does not the sense ascribed to *nihcshépa* comprehend a pledge, or the delivery of a pledge? It may be so: a deposit does arise in a pledge and the like. But when it is questioned whether a deposit or a pledge shall prevail, deposit, different from a pledge, is intended; in like manner as one name of kine may denote cattle of that sort, and a synonymous term in the same sentence may intend cows only: or the objection may be removed by saying, "without contracting his own dominion over them," instead of saying, "without annulling his own property in them."

Upanid'hi is a distinct sort of deposit, of which, CULLÚCABHATTA says, it is a distinction similar to that of religious mendicant and *Brahmána*: what the distinction is, YÁJNYAWALCYA declares:

4.

YÁJNYAWALCYA:—A thing enclosed *under seal* in a box or casket, which the owner delivers into the hand of another, without mentioning *its kind, form, of quantity,* is called in *upanid'hi* and must be restored in the same condition.

A box, casket, or other thing containing that which is to be bailed; a thing contained therein under seal, which the owner with confidence delivers into the hands of another for safe custody, without mentioning its kind, form, quantity, or the like, is called an *upanid'hi*. The *Mitácshara.*

"A box," or vessel with a lid and so forth, containing the thing bailed. The *Retnácara.*

'The thing bailed' signifies the thing which becomes a deposit.

"That which the owner so delivers:" 'thing' must be supplied as the subject, *to which the word "that" is joined adjectively.* "A box or casket;' a closed vessel, or the like, containing the deposit. The *Dípacalicá.*

The word "deposit" is there considered as signifying the chattel bailed. BHAVADÉVA cites the *Sárj*,† 'A *certain* vessel is called box or casket.'

* Literally, "bail a deposit."

† A dictionary so called.

"Such a deposit is called *upanid'hi*;" *for* a bailment under seal is a deposit. Open and sealed deposits are similar, *being bailments*. So JATÁD'HARA. From *upanid'hi* is derived *aupanid'hica*, the word used in the text; and it signifies 'belonging to a sealed deposit.'

5.

NÁREDA, cited in the *Mitácshará*:—When a thing is deposited, under seal, without mentioning its quantity; if its kind and form be unknown, it is considered as an *upanid'hi*: but the wise call a specified deposit *nihcshépa*.

"If its kind and form be unknown:" if the depositary know not whether it be gold, or silver, or what. Under seal;" secured by a private knot to prevent its being taken by another person, or secured by the impression of a seal on which particular letters are engraved; when a thing is so deposited, the bailment of it is *upanid'hi*. A specified deposit (or the bailment of a thing, of which the quantity, kind, and form are mentioned,) the wise call *nihcshépa*; and the construction is the same if deposit be referred to the thing deposited.

Since the text of NÁREDA clearly shows a distinction between open and sealed deposits, the distinction should be called evident: why does CULLÚCABHATTA compare this distinction to that between *Bráhmana* and mendicant? In the text of CÁTYÁYANA (32), sealed deposit is comprehended in the word *nihcshépa*; and NÁREDA, after premising the general sense of this term, propounds a distinction in a subsequent text: consequently it has both a general and a particular sense, as twice-born denotes the *Bráhmana*, *Cshatriya*, and *Vaisya* collectively, and also the *Bráhmana* separately; and further, VRÏHASPATI, premises *nihcshépa* (1), explains *nyàsa* separately from it, but not separately from sealed deposits.

6.

VRÏHASPATI:—When anything is carried and placed *in the house or in the ground of another, notice being given to him* by the owner, who has fear of the king, or of robbers and the like, or who wishes to deceive his heirs, it is called *nyàsa*.

According to the gloss of CHANDÉSWARA. "Notice being given to him," is supplied in the text, to exclude a thing deposited without the depositary's knowledge: there is no fault on his part if a thing deposited without his knowledge be lost. Why should a man place any of his own effects on another's ground? The text assigns a motive, "fear of the king," &c.

If it be said, this is the meaning of *nyàsa*, not of *upanid'hi*; the answer is, in the verse immediately following he mentions what is in fact denoted by the lastmentioned term.

7.

VRÏHASPATI:—*And when a thing* enclosed in a box *is placed*, without mentioning its kind, form or quantity, and without showing the thing.

"*Placed*" is brought forward from the preceding text: it follows, that this describes *nyàsa*, for no other name is mentioned. Consequently, *nyàsa*,

like *nikcshépa*, has both a general and a particular sense. So in the text of MENU (40), *nyàsa* comprehends both open and sealed deposits; and it is constantly used by VRĬHASPATI in describing a depositary. According to the *Mitácshará* and the rest, *nyàsa* is the delivery of a thing into the hands of a person belonging to the depositary's family, with these directions; "give this to your master:" and such a delivery occurs both in the case of open and of sealed deposits; but VRĬHASPATI has expressly declared it in the case of open deposits.

8.

CÁTYÁYANA:—A commodity sold, the deposit of one who is absent, a pledge, a bailment for delivery *(anwàhita)*, a loan for use *(yáchita)*, and a deposit for commerce, are considered as *upanid'his.*

"A commodity sold," but for some cause remaining with the vender: so the text is expounded in the *Retnácara.* We hold that the word, taken in a passive sense, means the commodity *sold;* but, if taken in a causal sense, it will intend *the price* of the commodity. "The deposit of one who is absent;" explained in the *Retnácara*, a thing deposited by one who is gone to a foreign country. The meaning is, that a thing which a man who has gone abroad, but, considering the delay of his return, sends home by a messenger or a friend, is the deposit of one who is absent. MISRA and BHAVADÉVA explain it, a bailment by another while the owner is absent in a foreign country. The *Mitácshará* contains this gloss: 'When a thing is delivered into the hands of some person, and he subsequently delivers it into the hands of another, with these directions, "give this to the owner," it is a bailment for delivery.' The *Dipacalicá* concurs in this explanation: and CHANDÉSWARA holds, that a thing which had been committed to some person, and which is bailed by him to another, with these directions, "you will deliver this to such a man, the owner," is a bailment for delivery. The difference between the two opinions consists in the intervention of one or two persons: and the exposition is founded on the following text:

9.

CÁTYÁYANA:—When a thing is bailed with these directions; "deliver this, as by my desire, to such a man, when he shall demand it for his own business," it is called *anwàdhi.*

What is bailed with these directions, "deliver this to another other than myself, and different from the owner," is *anwàdhi.*

The *Mitácshará* and others.

"Deliver this to the owner," must be supplied; what is bailed with these directions, deliver this to another other than myself, *but who is* "the owner," is *anwàdhi.* The *Retnácara.*

Both senses may be received; or even if the text be limited to one sense, the other may be assumed, from the expression "and the like," in the text of YÁJNYAWALCYA (10). A pledge transferred, as mentioned by MISRA and BHAVADÉVA, must also be included. A pledge received from another person, and delivered as a pawn to a creditor, on receiving a loan from him, is named a pledge transferred. We do not find whence the author of the *Mitácshará* has said, in explaining *nyàsa*, that the difference consists in the

delivery of the thing into the hands of a person belonging to the depositary's family: for the difference is, that *nyàsa* supposes one person; but a bailment for delivery supposes two.

How has CHANDÉSWARA distinguished *nyàsa*, *nihcshépa*, and *anwàhita*? It cannot be said that he holds *nyàsa* and *anwàhita* to be the same: for that exposition could not apply to the text of YÁJNYAWALCYA, where both are separately mentioned.

10.

YÁJNYAWALCYA:—This is the rule respecting a loan for use (*yáchita*), a deposit for delivery (*anwàhita*), a deposit unspecified (*nyàsa*), and an open bailment (*nihcshépa*), and the like.

" When he shall demand it for his own business" (9). By this expression is meant, if any person require a thing, and it be sent by a messenger, it is *anwàhita*. Some hold, because the word "owner" is constantly employed in the *Mitácshará* and other works, that the distinction is as follows: effects and the like, previously deposited, which are delivered to the owner through the medium of another person, are *anwàhita*; and what is bailed by the owner, through the medium of another, is *nyàsa*. But the word "owner" is not found in the text of any Sage, to ground upon it the opinion of these authors. HELÁYUDHA, reading " when he shall demand it for this purpose," thus expounds the text: 'when a thing is bailed with these directions, "deliver this to such a man, when he shall demand it for this purpose," it is called a deposit for delivery (*anwàdhi*).' The meaning is, that if some person, to oblige another, intrust any chattel employed at nuptials to some other person, with these directions, " when DÉVADATTA requires this to use it at nuptials or the like, deliver it to him," that chattel is a deposit for delivery (*anwàdhi*). Or if a man himself, or by a messenger, demand payment of a debt, and the debtor, after two or three days, deliver the amount of it to some other person, it is a deposit for delivery (*anwàdhi*). According to CULLÚCABHATTA and others, the word *anwàdhi* is either in a secondary sense, or is derived in a passive form. According to others, it is derived in a passive form, with a sense founded jointly on use and derivation.

'Clothes, ornaments and the like, requested and obtained, for a marriage or other occasion of rejoicing, are loans for use' (8).

The *Mitácshará*.

In this CHANDÉSWARA and ŚÚLAPÀNI concur. The *Dipacalicá expresses*; "they are considered as *upanid'hi*" (8), which is called *nyàsa* by VRI-HASPATI. The meaning is, whatever are the rules in regard to a sealed deposit, from the delivery to the recovery of it, the same are to be admitted in these cases. This is expressly declared in the text quoted from YÁJNYA-WALCYA (10): and it is directed by a text which stands near the definition above quoted.

11.

NÁREDA:—This very law is enacted in *the case of* loans for use, deposits for delivery and the like, bailments with an artist, sealed deposits, bailments in the form called *nyàsa*, and mutual trusts.

2. If a man privately receive a fine, or a valuable chattel, the law is the same in that case: these are declared to be the six sorts of deposits.

Loans for use, and deposits for delivery *(anwàhita)*, have been explained. "And the like," comprehends commodities sold, and so forth. "Bailments with an artist," explained in the *Retnácara*, things committed to an artist for ornaments and the like; and in the *Mitácshará*, gold or similar *materials* delivered into the hands of a goldsmith or other artist, to be worked into a necklace or other *ornament*. These are comprehended under the words "and the like," in the text of YÁJNYAWALCYA (10). "Sealed deposits," *(upanid'hi)*, already explained. "*Nyàsa*," according to VIJNYÁNESWARA and CHANDÉSWARA, signifies effects not shown to the owner of the house, but delivered in his absence to a person belonging to the house. According to CHANDÉSWARA, the *nyàsa* mentioned by VRÍHASPATI is a form of *nihcshépa*, and different from this. So many are the sorts of deposit *(nihcshépa)*, says CHANDÉSWARA; for NÁREDA employs this term in a general sense.

CHANDÉSWARA says, when a man privately receives a fine, as there is no evidence of his levying the fine, this very rule *is applicable*; and also when a man privately receives a valuable chattel, since there is no evidence of the receipt. Consequently if a man, to expiate a very infamous crime accidentally committed, pay a private fine to the king through a publick officer, and that officer, acting fraudulently, deny the payment of the fine; or if the king's officer assert that a fine has been paid, though none have been exacted; this very rule is applicable, namely, the rule declared for deposits: and if a man privately receive back a loan, a deposit, or the like, which he had himself given, and subsequently deny the receipt; in that case also this very rule is applicable. It is asked, what rule? The want of evidence being mentioned, it follows, that other proof must be sought: therefore, as ordeal is admitted when proof is sought of a deposit and the like, so, in this case, *ordeal is* also *admitted*. Such is CHANDÉSWARA's meaning. But it must be here considered, that ordeal is not mentioned in the text of NÁREDA, and is not intimated by the words "this law." Others say the words ("the law is the same *in the case* of fines, &c.") intend the delivery on demand and so forth.

HELÁYUDHA reads, if a man receive a *pógenda*, or adholescent; consequently, according to him, the law, respecting an infant received with valuable effects, is the same with that respecting deposits: it will be mentioned; and the whole of the law, declared under the head of Deposits, must be understood. A deposit may occur in regard to an infant. Thus a child, whose father and mother are deceased, is bailed by the king or his officer, or by the child's maternal uncle; in this and in other cases a deposit arises.

How is the law of deposit *(nihcshépa) extended* by the Sage to mediate and unspecified deposits *(nyàsa)*, since what is denoted by *nihcshépa* is sound in *nyàsa* and the rest?* CHANDÉSWARA reconciles it thus; "some distinction may be supposed." The distinction is mentioned by CULLÚCA-BHATTA; "like that between *Bráhmana* and mendicant." Or peculiarities, different from those of *nyàsa* and the like, may be supposed in the definition

* *And therefore, what in its nature* belongs *to them, is not* extended *to them.*

of *nihcshépa*: such as, delivered before witnesses; different from bailments with artists; or the like. There are only six sorts of deposits; for, in judicial procedure, *nyàsa* extends to the mere delivery of a chattel for safe custody; and loans for use and deposits for delivery are held one sort: and whatever is included in the words "and the like," is also considered as a single sort of deposit; and the receipt of a fine, or of a valuable chattel, is also admitted as a single sort of bailment. This is the method of the ancients: but according to the author of the *Mitácshará*, who admits the separation of loans for use, deposits for delivery and the like, a mediate and unspecified deposit (*nyàsa*) and mutual trusts (*pratinyàsa*) must be considered as a single sort of bailment. A mutual trust may thus arise, according to the author of the *Mitácshará*: "let your jewels or the like remain with me, who reside in a secure place; and let my copper vessels and similar effects, which are coveted by my heirs, remain with you;" on such an agreement, the effects are mutually bailed. In some cases, mutual deposits are made in the form of a sealed bailment; and in the case mentioned, a mutual deposit arises in the form of an open bailment, not a mutual deposit in the form of a mediate bailment (*nyàsa*): for the author of the *Mitácshará* holds *nyàsa* to be a delivery into the hand of a person belonging to the house. But there is no difficulty, for the word *pratinyàsa* comprehends mutual deposits in other forms.

12.

VRÍHASPATI:—If a contest arise concerning a deposit privately made, proof by ordeal is directed for both parties:

2. In the case of a deposit for delivery, a loan for use, a bailment with an artist, and a pledge, the same law is enacted; and likewise in the case of a person received under protection.

If the depositary do not acknowledge a deposit privately received; or the bailer, having received back what he had himself deposited, deny the receipt; or if he allege a deposit, though none have been made: in all these cases, ordeal is directed, if there be no evidence: this will be explained in its place. CHAǸDÉSWARA says; if a contest arise concerning a woman, a slave and the like, who, from fear or other motive, have sought protection, and are claimed by their lord, the same law is enacted. The meaning is, that, in this case also, proof by ordeal is directed.

Here all the rules declared in regard to a private deposit, are to be applied to each case, from deposits for delivery, to persons received under protection. Therefore, a depositary protects what he has received in trust, like his own property, from water, fire, thieves, and other danger; and likewise in the case of a person received under protection. Wherever the property of one person is, for some cause, delivered into the hands of another for safe custody, the rules declared in regard to deposits are to be applied: therefore, the law of bailments applies to a carriage and the like received on hire; and so in the case of a person delivered by the king or the like into the hands of a guardian, or the produce of a field bailed for safe custody by a subject. What is the law in respect of bailments, which is extended to loans for use and the like? It is answered, all the rules propounded by Sages, from the delivery to the recovery of a deposit, must be understood.

13.

MENU :—A sensible man should make a deposit with some person of high birth, and of good morals, well acquainted with law, habitually veracious, having a large family, wealthy and honest.

"Of high birth;" sprung from an honest family. "Of good morals," whose conduct is laudable. "Habitually veracious;" in his discourse observant of truth. "Having a large family;" having sons, grandsons, or other family to support. "Honest;" plain in his dealings, void of artifice, and so forth. With such a person should he make a deposit. Such is the interpretation approved by CULLÚCABHATTA.

"Having a large family," is explained in the *Viváda Chintámeni*, having many kinsmen. In the *Retnácara*, "a deposit" is expounded the thing to be bailed. "High birth," and the rest, are conditions required to obviate all doubt of receiving back the deposit at a subsequent time: for, since the abuse of a deposit is a heinous crime, a person sprung from a good family will not abuse it; much less a person of good morals, and well acquainted with law. A man habitually veracious will not assert a falsehood. Why should a wealthy man, content with his own wealth, commit a heinous crime by embezzling another's property? An honest man cannot commit a fraud. One who has numerous offspring, even though he believe not another world, will not embezzle the property lest his offspring perish. Or it may be thus explained; he who has no offspring, being unaided, cannot well protect the deposit. This agrees with the exposition of MISRA and others. The description is general, including exemption from other defects. The whole of it must be taken as a motive for confidence. So NÁREDA *says* (3), "when a man bails any of his effects to another, in whom he has confidence, &c." In this text (13) deposit is used in a general sense, comprehending bailments under seal and the rest.

14.

VRÌHASPATI :—A man should make a deposit with due consideration of the place, of the house, of the master of the house, and of his power, wealth, qualities, veracity, purity, and kindred.

"The place," which contains the thing deposited; with due consideration, whether it be secure from robbers and the like. Or "the place," may intend the town; considering the safety of a populous place, where the property is protected by many. "House," or wife, (for the word has both senses;) considering whether the wife be virtuous, lest at her suggestion the effects be secreted; for a man, though virtuously disposed, may be instigated, through lust, to secrete the effects. Or considering whether the "house" be built of masonry, and secure from fire. "His power;" is the depositary capable of protecting the effects? "His qualities;" his honesty, his acquaintance with the law, and the like. "His purity;" his avoiding sin, and so forth. "His kindred;" his sons, grandsons, and the rest.

15.

NÁREDA :—A deposit is declared to be of two sorts, attested and unattested: it must be restored in the condition, *and manner*, in which it was bailed; if altered, there must be a trial by ordeal.

An unattested deposit is made, when a man has the highest confidence in another. If it be asked, why a similar distinction of loans has not been mentioned? it is answered, that, from the nature of a loan, it must either be authenticated by witnesses or by a writing; for excessive confidence is forbidden.

A rule of Ethicks:—Place not confidence in what is unworthy of confidence; nor excessive confidence in what is *even* worthy of confidence.*

The purpose of a deposit made to deceive heirs (6) would be defeated, if it were publickly known. The selection of a proper person for the confidence reposed in him, at the choice of the owner, must necessarily be admitted, in contradiction to that rule of ethicks, to fulfil the purpose of a deposit: but in the case of a loan, the selection, at the lender's choice, of a suitable person for the confidence reposed, is not proper; *the rule is positive*, like the prohibition against lending to infants. Therefore a loan unattested is not mentioned; and in fact such is the present practice.

A deposit must be restored in the condition *and manner* in which it was bailed (15). Thus, if it be bailed under a seal, it must be restored under that seal; if it be bailed before witnesses, it must be restored before witnesses; if it be privately bailed, it must be privately restored; so likewise if it be bailed without a seal, or unattested. Again; if more than one make or receive a deposit, they shall jointly recover or restore it; and similarly in other circumstances. The same meaning is to be understood from the text of YÁJNYAWALCYA (5), and from the following text:

16.

MENU:—Whatever thing, and in whatever manner, a person shall deposit in the hands of another, the same thing, and in the same manner, ought to be received back by the owner: as the delivery *was*, so *must be* the receipt.

As it may be questioned whether the latter part be not superfluous, since it repeats what preceded, CULLÚCABHATTA says, 'it is mentioned as a 'cause: because it is a rule, that as the delivery was, so must be the receipt; 'therefore the same thing ought to be received back in the same manner. 'This directs, that, if gold and the like have been bailed under a seal, and 'the bailer, breaking the seal, say, "weigh it, and deliver it to me," he 'shall be amerced.' We do not find how it appears that he shall be amerced. If the bailer require it to be weighed, the king should compel him to receive it unweighed: and this is the purport of the text.

Here lawyers, unfettered by ordinances, say, two terms ("from him, and by him,") must be supplied: consequently the sense of the first part of the text would be, whatever thing (gold or the like), and in whatever manner, a person shall deposit in the hands of another, the same thing, and in the same manner, ought to be received by him the depositary, from him the bailer. The word delivery is in a passive form; as *the thing was* delivered, so *it must be* received *by the bailee*: and if there be a subsequent contest respecting the quantity, and the king ask, "why did you receive it unseen, or unattested?" then the first part of the text furnishes an answer: "it

* Cited from the *Herivansa*. See Book I, towards the end of the first Chapter, p. 23.

was *so* received under the authority of the law." The intention of the latter part of the text is evident.

MENU clearly declares the form of a mutual deposit:

17.

MENU:—But things mutual deposited should be mutually restored, by and to the person by and from whom they were received: as the bailment *was* so *should be* the delivery.

DÉVADATTA intrusts a thing to YAJNYADATTA; and YAJNYADATTA intrusts a thing to DÉVADATTA: having been mutually received, the things should be mutually restored. One cannot alone receive his own property, *merely* because he delivered his own property. "As the bailment was, so should be the receipt:" a deposit received with or without attestation should be so restored. If one say, "let my chattel remain with thee," and the other also say, "let my chattel remain with thee;" it is a mutual delivery: if one say, "let thy chattel remain with me, and my chattel with thee," it is a mutual receipt and delivery: and if some person, seeing that another is unable to protect his property from robbers, and intending to confer a favour, say, "let thy chattel remain with me;" and if he, desirous of returning the favour, say, "thou hast many chattels of small value, let them remain with me," it is a mutual receipt. Or the distinction between mutual receipt and mutual delivery may be explained in any other manner. Thus some expound the text: but CULLÚCABHATTA explains it by a deposit privately made; "a thing privately deposited," &c. A delivery mutually attested, that is, not attested by others. "By whom it was received;" privately received by the depositary. "Mutually restored;" privately restored *to the bailer:* to restore it before witnesses should not be required. "As the bailment was, so should be the delivery," is mentioned as the reason. "Should be restored;" this rule regards the depositary; "ought to be received," &c. (16) regards the bailer: consequently there is no *vain* repetition.

18.

VRÍHASPATI, quoted in the *Retnácara*:—The very thing bailed must be restored to the very man who bailed it, in the very manner in which it was bailed: it must not be delivered to his heir apparent or presumptive.

If bailed before witnesses, it must be restored before witnesses; and without exceeding the period for which it was bailed, if a period were stipulated: and, in the case of mutual deposits, the receipt must be mutual. The *Retnácara* interprets "his heir," &c. his son and the rest.

19.

VRÍHASPATI:—A deposit is declared to be of two sorts, bailed before witnesses, and privately bailed; it must be preserved as *carefully as* a son *is cherished; for* it would be lost by neglect.

2. The merit of one who preserves a deposit, or protects a dependant,* is the same with the merit of him who gives golden vessels or clothes.

* Or a person received under protection (12).

3. As the crime of a woman who injures her husband, or of a man who kills his son or his friend, such is the crime of depositaries, if the thing deposited be consumed, or spoiled by gross negligence.

4. A *prudent* man would not receive a deposit; but to destroy it, when received, is infamous: he must keep it with care, and restore it on a single demand.

For a written contract of bailment there is no authority in the law, nor in judicial practice: but doubts may be now obviated by making such a contract. A deposit *must be preserved* from robbers, from vermin, from decay and the like; if no care be taken, and the thing be never inspected, it may decay in the ground; or be stolen by neighbouring theives entering the house; or, if it be small, it may be carried away by rats: in these and similar modes it may be destroyed. Why should a man labour to preserve another's property? The text furnishes a motive (19, 2). But he who is not desirous of religious merit, will not preserve it: therefore it directs, (19, 3,) that the sinful taint of a husband's murder, and similar crimes, is contracted by aliening a deposit without permission, and by neglecting to preserve it. The preservation of it is indispensable; therefore, a deposit should not be received by a person who is not disposed to an act of duty or amity.

Here it must be noticed, that when the property of another is bailed by slaves, strangers or robbers, to deceive the owner, that deposit ought not to be received; for usage *forbids it:* and the depositary might be suspected of theft, should he be unable to show that the bailer actually made him receive the deposit. If among undivided brethren one parcener deposit joint property with some other person, to deceive his coheirs, the depositary is censured.

"A man should not receive a deposit" (20, 4), because it is a crime in the depositary, if the deposit be consumed. "But, to destroy it, is infamous:" the particle may be taken in a connective sense; and the meaning will be, the consumption and the destruction of the deposit are infamous. "He must restore it on a single demand," if no period have been stipulated; but at the expiration of the period, if it were bailed for a stipulated time; or the bailer may receive it back sooner, with the depositary's consent.

20.

MENU:—A deposit, whether sealed up or not, should never be re-delivered, while the depositor is alive, to his heir apparent or presumptive: both sorts of deposits are lost if he die, but not unless he die.*

'They should not be re-delivered to the son, the brother, or other per-'son who would be entitled to them after the bailer. To assign a reason, it 'is said, "both are lost, &c." that is, because both are lost, if they are deli-'vered to a son or other heir, and he dies without delivering them to the 'owner. It follows that, *in such a case,* they shall be made good by the 'depositary. But they are not lost, unless he die: they will be delivered by

* The latter part of the text has been otherwise translated by Sir WILLIAM JONES: "both sorts of deposits, indeed, are extinct, *or cannot be demanded by the heir,* if the depositor die, *in that case;* but not unless he die: *for, should the heir apparent keep them, the depositor himself may sue the bailee.*" I alter the translation in conformity with the commentary.

'the son or other heir to the depositor; they are not to be made good by the 'depositary. Consequently, if they be delivered to the heir, there is dan-'ger that the heir may die, and that the deposit must be made good; there-'fore, neither sort of deposit should ever be re-delivered to the heir.'

CULLÚCABHATTA.

He supposes this case; the heir dies after receiving back the deposit, and long afterwards the owner says, "the deposit was not delivered to my heir, but remains with you, give it me." It cannot be said, that, since the same may occur in the case of a debt, the delivery to a son and the like is improper even in that case; and therefore the text, which directs payment to one of the family in default of the lender, is unmeaning. In that case, the delivery may be ascertained by attestation. It cannot be said that here also it may be so ascertained; for the attested recovery of an unattested deposit is forbidden (17): and, even in the case of such re-delivery of an attested deposit, the depositor's claim remains. Thus *the owner might say*, "on what consideration did you relinquish the deposit in my absence?" but, in the case of a debt, the creditor cannot say so. The text is not unmeaning, for there is a purpose in making the payment; namely, the recovery of a pledge when interest has ceased; but, in the case of a loan unsecured by a pledge, upon which the highest interest has been received, the debtor may not repay it to the son or the like. In fact, there is no offence in repaying it to the son or other representative, on the consideration, that body is not immortal, and to remove the sin of debt; for the debtor incurred the debt under the pressure of indigence. But, under the authority of the text, a deposit, voluntarily received, must be kept until the depositor return.

Again; this should now be remarked: we perceive no offence in re-delivering a deposit to the heirs of the depositor before witnesses, under the apprehension of ill-treatment from those heirs, *even* before the expiration of the period for which it was deposited.

If a son or other representative should die after receiving back the deposit while the depositor was alive, and it have not reached the depositor, having been expended by the heir; and this be proved by witnesses and the like; must the depositary make good the deposit or not? To this it is answered, that, according to CULLÚCABHATTA, it shall not be made good: for he says, both sorts of deposits shall not be made good, if there be no doubt; and even sometimes, though the heir be not dead, they are not lost. Thus, if the heir be living, the depositary is justified by proof of the delivery to the heir: this is clearly expressed. What difference is there, if the heir be dead? After the death of the heir there may be suspicion, if proof be deficient. It should be remarked on the term "heir apparent or presumptive" (*pratyanantara* v. 20.), that the word *prati* denotes similarity, as in the example "ABHIMANYU like ARJUNA." The word *anantara* signifies proximate without an interval. Consequently a deposit can be legally received back by the nearest heir alone.

But CHANDÉSWARA, without employing the word 'even,' says: sometimes the depositor shall recover it, though the heir be not dead: it follows, that sometimes the deposit is extinct, though the heir be not dead; that is, when the heir dissipates it without permission. Consequently, even in that case, it must necessarily be made good by the depositary; otherwise, the expression "but not unless he die," would be unmeaning. In such a case it must certainly be made good. This is CHANDÉSWARA's meaning, and is

proper; for, a son having no dominion over the paternal wealth while the father lives, his receipt of the thing deposited is not valid; as is declared by HÁRITA, (Book V, v. 8). Thus the son's receipt of it is similar to a stranger's receipt. But when it is anyhow received by the owner, the delivery becomes valid. Consequently, if it anyhow fail of reaching the owner, it must be made good. But if the son conduct all the affairs while the father lives, there is no offence in a re-delivery to him. However, a deposit, expressly bailed to deceive a son, must on no account be delivered to that son while the father lives, without his directions: but, with his permission, there is no offence in re-delivering the deposit to the son; and, after the death of the depositor, there is no harm in the re-delivery of it to the heir.

21.

MENU:—But if a depositary, by his own free act, shall deliver a deposit to the heir of a deceased bailer, he must not be harassed either by the king or by the kinsmen *of the deceased.*

The expression "by his own free act," implies, that while the bailer lives, it shall not be delivered, though demanded by the heir; but after the bailer's death, it should be delivered, even without a demand. CHANDÉSWARA.

He must not be harassed by the king, on the ground of its being the bailer's property. CULLÚCABHATTA.

"By the kinsmen" of the bailer; by his father's sister's sons, his mother's sister's sons, and the rest. The meaning is, that after the bailer's death, his sons, or other heirs, have dominion over the effects deposited; and if a son be living, it must not be delivered to a grandson whose father is alive.

If a deposit, though carefully kept, be taken away by thieves or the like, there is no fault in the depositary.

22.

NÁREDA:—What is lost, together with the property of the bailee, is lost to the bailer; so if it be lost by the act of GOD or of the king, unless there was a fraudulent act on the part of the depositary.

"Lost, together with the property of the bailee;" meaning *generally*, if there be no fraudulent act on the part of the depositary. Thus, if the deposit only be lost, and not even a trifle belonging to the depositary, yet, if it were kept with care, and consumed by time only, there is no fault in him. If it be lost by the act of GOD (broken by a wall falling down), or be lost by the act of the king (plundered by the forces of a foreign king; or oppressively sold, or the like, by the king of the country;) then, as in the case of consumption by time, there is no fault in the depositary. But he is criminal if fraudulently he place the thing deposited near an old wall or the like, while he places his own property elsewhere; or if, concealing his own property, he show the deposit to the king. The principle of this rule is, that the depositary must make good the deposit if he be in fault, and not unless he be in fault. But if the depositary say it is lost, though it be not lost; then, on failure of evidence, it shall be tried by ordeal.

23.

VRÍHSAPATI:—If it be destroyed by the act of GOD or of the king, together with the goods of the bailee, there is no fault in him.

"Together with the goods of the bailee;" to denote that there is no fraudulent act on the part of the depositary. It is to be remembered, that if he deliver the deposit to the king, together with his own goods, without mentioning that it belongs to another, even in that case the depositary is criminal: and if it were kept with care, then, even though the deposit alone be seized by thieves or the like, there is no fault in the depositary. Herein the *Retnácara* and the rest concur.

24.

CÁTYÁYANA:—If a thing deposited be lost, together with the goods of the bailee, though not by the act of GOD or the king, it is declared to be lost to the bailer.

The loss of the bailee's goods, everywhere mentioned, is intended as a *general* exception to all fault in the bailee. It is therefore inferred, that even if the deposit alone be lost, but without any fault in the depositary, it shall not be made good; but if lost by a fraudulent act on the part of the depositary, it must be made good. The *Retnácara.*

25.

YÁJNYAWALCYA:—But he shall not be compelled to replace that *deposit* lost by the act of GOD or the king, or seized by robbers.

He shall not be compelled to make good a sealed deposit, lost with the vessel in which it was contained, (being seized by the king, or washed away by water or the like, or stolen by thieves,) if there be no fraudulent act on his part. The *Mitácsharú.*

A similar exposition is delivered by SÚLAPÁNI, who reads the text *daivata* instead of *daivica (but the sense is unchanged).* If it be lost by a fraudulent act on the part of the depositary, or by his fault, he shall be compelled to make good the deposit, and shall be amerced. This will be declared. A distinction is mentioned in the following text:

26.

MENU:—If a deposit be seized by thieves, *or destroyed by vermin,* or washed away by water, or consumed by fire, the bailee shall not be compelled to make it good, unless he took part of it himself.

If a person receiving a deposit consume a part of it, and afterwards the remainder be seized by thieves or the like; some hold, that, under the authority of the text, the depositary shall in that case make good the whole deposit. But others say, that the depositary shall make good the whole if he accidentally receive any part of the deposit which has been seized by thieves or the like. This is denied, because it is not fit that the loss should be his, without any fault in him: but if he do not make it known that he has received the thing, he is criminal, and shall make good the deposit, as in the preceding case. Since he is criminal, if he consume any part of it, whether before or after it was seized by thieves or the like, he shall make good the whole deposit. This is the full meaning of the text. In that case he shall make it good with interest, if he consume a part of the deposit; but without interest, if he merely omit to make it known that he has received a part of it.

If he take a part of it, and deposit the remainder elsewhere; or neglect it, thinking that he will not be liable to make good the whole; in that case, the whole must be made good. MISRA.

When the deposit is lost by the depositary's fault, he shall make it good; but when it is lost by the fault of the person through whom it was deposited, then this person shall make it good.

27.

CÁTYÁYANA:—What is lost by the fault of the depositary, is lost to him.

2. He by whose fault anything is lost or taken away, shall be compelled to make it good, with interest, unless *it be lost* by the act of GOD or the king.

But even if the depositary have shown *a probable* cause of its destruction, if the thing deposited appear to have been lost by any fault on his part, other than neglect, he shall make it good. The *Retnácara.*

A man addressing some person, says, "let my property remain in deposit with thee;" he replies, "my house is infested by rats and other vermin, place it not there;" the other rejoins, "be it so, what can vermin do? and he accordingly deposits the goods. It follows, that in that case there is no fault in the depositary, if it be lost by neglect. But if he place it out of the house, or in another place, and in consequence it be seized by thieves, or spoiled by rain; or if, from anger or some other motive, he cast it of his own accord into the water; or if he deliver it to the king, who causes his household effects to be sold on account of some fault; if the thing deposited be lost by these or other faults on the part of the depositary, he shall make it good. This is intended by the first hemistich (27).

When, addressing some person, a man says, "bail this grain to DÉVADATTA;" and he, going to DÉVADATTA, says, "this grain is bailed to thee, by CHAITRA, through me;" and DÉVADATTA answers, "place it in the house;" and he places the grain in the middle of the house, but in a damp spot; and the grain is destroyed by the damp: in this case, the grain shall be recovered from the messenger. This is intended by the second verse (22, 2): for, otherwise, it would be superfluous. Thus, if the depositary be understood in the words "he by whose fault," the sense is the same as in the preceding hemistich; and if the depositor be understood, then the receiver and giver would be the same; it is therefore properly applied to an intermediate person: and, according to the *Dipacalicá*, when the deposit is destroyed by the fault of the person who causes it to be placed, he shall make it good. But when the owner bails effects notwithstanding the depositary's objections, and those effects, being neglected, are lost, but without any other fault on the part of the depositary, in that case no blame shall be imputed to the depositary.

28.

CÁTYÁYANA:—If the depositor, though apprised of its danger, *nevertheless* bail the thing, and it be destroyed by any injury, the depositary shall not be compelled to make it good.

If the depositor know the loss of his effects to be probable, (having been forewarned by the depositary, that the king would force the house, and therefore he ought not to place his effects there;) if he nevertheless bail those effects, there is no fault in the depositary, should they be lost by any

cause, whether it be the occurrence which was previously apprehended, or *some accident* which was not apprehended. In this exposition, the *Retnácara* and the rest concur.

Is this text applicable or not, when, in such a case, the deposit is lost by negligence? Here it is said, that the text does apply in the case of a loss occasioned *merely* by negligence, without any other fault: for another text (24) *already* shows, that there is no fault in the bailee, if the deposit be lost without neglect or other *fault;* and it is declared, that the depositary is criminal, if it be lost by his fault. It cannot be said that the former text (24) intends the case of a deposit lost, together with the goods of the bailee; but that this text (28) intends a deposit consumed by time, though not neglected, and without a concurrent loss of the bailee's own effects. For, according to CHANDÉSWARA, it is not limited to the case of the bailee's goods being lost with the deposit; 'the loss of his goods, everywhere mentioned, is intended as an exception to other faults also;' and the text (24) is taken only in the sense *so* inferred: this corresponds with what CHANDÉSWARA has said in explaining another text (27).

29.

GÓTAMA:—The necessity of making good a deposit, a thing bailed for delivery to a third person, a pledge, a thing borrowed or hired, and the like, if destroyed by the fault of the bailee, shall not fall upon any of his heirs, if they were free from blame; but it falls on the bailee, by whose fault the thing is destroyed.

"Deposit," &c. in a general sense. Whatever has been mentioned by any Sage or Author as partaking of the nature of a deposit, must be understood. "Heirs;" sons, grandsons, and the rest. "Free from blame;" not in fault. Consequently, should the depositary die, the owner recovers the thing deposited from the heirs of the bailee, *if it be lost by their fault:* thus is the law settled. But if it be lost without any fault, by accident or the like, he does not recover it from the heirs. This exposition is founded on the gloss of the *Retnácara.*

Is not this gloss ("heirs;" sons, grandsons, and the rest) unmeaning? for the depositary himself is free from blame, if the deposit be lost without any fault on his part. It must be understood, that this text is intended to obviate the doubt, whether, in case of the depositary dying after having occasioned the loss of the deposit by his own fault, the owner may recover it from his sons, because it was lost by their father's fault: but if it be lost by their fault, it must be made good by them (27, 2).

SECT. II.—*On the Recovery of a Deposit.*

It has been said, that *the depositary* shall be compelled to make good *a deposit destroyed by his fault;* shall he be compelled to make it good with, or without, interest?

30.

VYÁSA:—For a thing voluntarily wasted, the bailee shall be forced to pay the price with interest; for a thing neglected, the value only; for a thing lost through *slight* inattention, something less.

When the owner, having bailed a thing, demands it at a distant time, and the depositary, having wasted it, cannot deliver it; then a contest arising thereon, if it be proved that he has wasted the thing, he shall be compelled to make it good with interest. "Wasted" is not exclusively intended; but any advantage which the depositary procures for himself *by the thing bailed*, is fully meant; hence the sale and other embezzlement of the thing deposited, is comprehended in this precept.

31.

VRIHASPATI:—Whatever depositary procures advantage for himself by the thing bailed, *without the consent of the owner*, shall be amerced by the king, and made to pay the price of that thing with interest.

Here also "without *the* consent *of the owner*" is determinately meant. Having procured advantage to himself by the thing bailed, without the consent of the owner, if he make it good in another mode, he may be exempted from the payment of interest, and from the fine, by the forbearance of the owner, and of the king. The *Retnácara.*

The commentator's meaning is, that even if the thing bailed be wasted, the payment of interest and of a fine is not customary; but the value of the chattel only must be made good. Otherwise this text would be trivial, *because the punishment of an offender is a matter of course.*

The preceding text (30), attributed in the *Mitácsharà* to CÁTYÁYANA, is ascribed to VYÁSA by CHANDÉSWARA, MISRA, BHAVADÉVA, and others. The interest, according to MISRA, shall be the eightieth part *of the principal by the month,* as ordained by the law.

32.

CÁTYÁYANA:—A deposit, the balance of interest, a commodity sold, and the price of a commodity purchased, not being paid after demand, shall bear interest at the rate of five in the hundred.

"If the debtor be a *Súdra*" *must be supplied,* to reconcile it with the text, which directs interest at the rates of two and three in the hundred and so forth, (Book I, v. 29, 2).

It is directed, that a thing voluntarily wasted shall bear interest: does interest commence from the day when the thing was deposited, from the day when it was wasted, or from the day when it was demanded? 1. To this it is answered, it shall bear interest after six months from the date of the deposit: for, the words "after three seasons" being repeated in this text (32) from the preceding text (*Book* I, v. 56, 1), it is proper to assume the date of the deposit, in answer to the question, from what date shall three seasons be counted? 2. Some hold, that a deposit, not delivered on demand, shall bear interest six months afterwards, because demand is suggested by the context, where MISRA directs interest at the rate of five *panás* in the hundred after six months. 3. Since the wasting of the thing deposited is the cause of its bearing interest, under the authority of the text (30), we hold it proper, that interest should commence (even earlier than six months) from the day when the thing was wasted; but the other text (32), ordaining interest after six months, is applicable to the case where a fraudulent depositary, though, the thing have not been wasted, refuses to deliver it on demand; like the price of a commodity purchased,

and like the balance of interest, and so forth. What then shall be the rate of interest? Two in the hundred, and other rates ordained by the law; because those are in their nature legal rates, and because interest is so limited by the text of MENU (Book I, v. 42): and the interest and amercement should be proportioned to the magnitude of the offence. But this does not coincide with the opinion of the author of the *Mitácsharà;* for he applies the text (32) to a thing voluntarily wasted, and does not distinguish *payment of* interest, and exemption from interest, in cases where a thing deposited is lost by neglect, and so forth.

The text of VYÁSA (30), being placed under the head of Deposits Damaged, relates to such as are damaged by the use of them. Consequently, if a stone or the like, bailed without seal, be used for three or four days, it shall not be restored with interest: the payment of interest regards things damaged by the use of them.

33.

YÁJNYAWALCYA:—If the depositary, of his own accord, *without the consent of the owner,* use the thing deposited, he shall be amerced, and compelled to pay the price of the thing with interest.

"Of his own accord;" that is, without the assent of the owner. "Use the thing deposited;" employ it for his own purposes. Such a depositary shall be amerced. The fine not being specified, he shall be amerced in the value of the thing, like the depositary who does not deliver the thing on demand; and he shall be compelled to pay the price of the thing with interest.

"For a thing neglected, the value only," (30); the depositary shall be compelled to pay the value only of a thing neglected, that is, of a thing lost by his negligence, such as disregard of it because it was another's property: in this case, interest shall not be exacted. It must be remembered, that, according to the third opinion abovementioned, if it be not delivered on demand, it shall bear interest after six months; but the value only shall be required, if it be made good immediately after the demand.

34.

VRÌHASPATI:—Should the bailee suffer the thing bailed to be destroyed by his negligence, while he keeps his own goods with very different care, or should he refuse to restore it on demand, he shall be compelled to pay *the value of* it with interest.

"But his negligence, while he keeps his own goods with very different care;" by neglect, after separating the thing bailed from his own effects. If the depositary, fraudulently removing the thing deposited, which was placed with his own goods, secure his own effects, but neglect the deposit; and the thing, being guarded by no one, but left anywhere unheeded, he consequently lost; in that case he shall pay interest by way of fine, in like manner as if it had been wasted: for the removal of that thing was a great offence. In this case, the payment of an equal fine to the king is proper; but it is not mentioned by any Sage.

"Or should he refuse to restore it on demand;" should he refuse or evade restoring the deposit, without making it known that the thing has been lost by neglect; (for example, if he say, "Am I thy servant, that thou

shouldst deposit thy effects with me? I know not where thy goods were placed, nor by whom, nor what is become of them;" or, "that thing was not bailed, but given to me:") in this case, it shall be made good with interest; for his fault is great, in not making it known that the thing bailed has been lost. According to the third opinion, interest must be paid from the day the thing was lost; in other instances, according to the nature of each case, interest commences after six months *and so forth.* Thus some lawyers reconcile it to the law, which directs the value *only* to be made good if the thing bailed be not restored on demand. Others hold, that if the thing deposited be not restored on demand, it shall be made good to the owner with interest, and a fine be paid to the king equal to the value of that thing: thus establishing, by implication, the consistency of all the texts with each other. Some reconcile them by directing the value to be made good with or without interest, according to the qualities of the depositary.

The Mitácshará explains "something less" (30) a fourth less. The meaning is, that, if the thing be inadvertently lost, (having been neglected through forgetfulness, long after it was received in deposit,) the fault being small, three-fourths only of its value shall be made good.

35.

YÁJNYAWALCYA:—If a *sealed deposit* be lost, *even by the act of* GOD *or the king,* after it has been demanded and not restored, *the bailee* shall be compelled to pay the value of the thing, and an equal amercement.

If it had been demanded, (required by the bailer,) and not restored by the bailee; should a loss of the deposit afterwards happen by the act of GOD or of the king and so forth, effects of equal value must in that case be given, and a fine of the same amount be paid to the king.

The *Mitácshará*, *Retnácara*, and the rest, concur in this exposition. The author of the *Mitácshará* inserts this hemistich as an exception to a text quoted in the preceding section (25). Here the thing is made good without interest, because he must make good, out of his own effects, the thing bailed, which has been lost by accident. This is not inconsistent with the opinion of others, *grounded on the following text:*

36.

NÁREDA:—He who restores not a deposit to the bailer, though required by him, shall be fined, to the use of the king; and, if it be *afterwards* lost, shall pay its full value.

2. And he who procures advantage for himself *by the thing bailed,* without the consent of the bailer, shall be amerced, and be liable to pay the value of the thing, with interest.

They hold that a fine is here directed, if the deposit be fraudulently withheld, though not lost; and the fine shall be equal to the value of the thing, as in the preceding cases, and as intimated by the sequel of the text: the deposit must of course be restored; but it shall be restored with interest, on the concurrent import of the text of VRĬHASPATI.

If a thing not restored on demand be lost, without any fault on the part of the depositary, by the act of GOD or the king, its value shall be

made good to the owner without interest, as has been already mentioned almost *in as many words*. A certain author says, if a thing be merely refused when demanded, it shall be made good with interest; but if it be also lost by accident, its value shall be paid without interest, and a fine shall be paid to the king. Of these opinions, whichever seems best supported may be adopted.

The second verse (36, 2) has been in a manner already expounded; for it corresponds with the text of VRĬHASPATI (31): and the amercement shall be equal to the value of the thing; for what is affirmed in one case, is applicable to other similar cases.

37.

MENU:—He who restores not a thing really deposited, and he who demands what he never bailed, shall both be punished as thieves, or pay a fine equal to the value of the thing claimed.

In a suit where a deposit is alleged by one party and denied by the other, if it be proved that the thing was in fact bailed to him, the depositary shall be punished as a thief; according to the quantity and nature of the thing proved to have been bailed, he shall be punished as a thief, by death, or confiscation, or other punishment ordained for theft of such things in certain quantities: and such shall be the punishment, even though the deposit be merely denied. But if the depositary be *in general* virtuous, the legislator directs, that he shall only pay a fine equal to the value of the thing: consequently, he shall not in this case be punished by death, or *confiscation or* the like. The same must be understood of the claimant, according to the circumstances of the case, if it be proved that no deposit was made. CHANDÉSWARA holds, that they shall be punished as thieves, if the suit regard valuable things; and pay a fine equal to the value of the thing, in the case of a trifling demand. CULLÚCABHATTA says, 'they shall be punished as thieves, if gold, gems, pearls or the like be demanded; or, in the case of a trifling demand, shall pay a fine equal to the value of the thing claimed.' But a *Bráhmana*, he adds, whether virtuous or not, who withholds a thing deposited, or demands what he never bailed, is not liable to the punishment of death and the like.

38.

MENU:—The king should compel a fraudulent depositary, without any distinction between a deposit under seal or open, to pay a fine equal to its value.

And that if the *Bráhmana* be free from vice; but if he be vicious, he shall pay a fine equal to double its value, as directed in a text which will be quoted from the *Matsya purána*. Such is the modern interpretation. CHANDÉSWARA remarks: Punishment similar to that of theft is denied by the second text (36); and the exaction of a fine equal to the value of the thing is positively ordained, whether the deposit be of considerable or trifling value; and that is to be understood in the case of a *Bráhmana* being the depositary. "Without any distinction between a deposit under seal or open:" from this expression it appears, that all that which has been propounded respecting the non-delivery of open deposits and so forth, is also applicable to the non-delivery of a sealed deposit, the unauthorized use of it

and so forth : CULLÚCABHATTA says, let the king amerce a fraudulent depositary in a sum equal to the value of the thing bailed : from the parity of the cases, the text does not repeat, that he who demands what he never bailed shall also be fined. If the offence be great, it might appear from the preceding text, that corporal punishment is to be inflicted on any other than a *Bráhmana* : this text denies it, for the law directs a pecuniary fine. Nor is the preceding text unmeaning : for this text applies to a first and slight offence ; and the preceding text intimates a pecuniary fine for a second offence, that is the highest amercement ordained in cases of theft.

39.

MENU :—That man who by false pretences gets into his hands the goods of another, shall, together with his accomplices, be punished by various degrees of whipping or mutilation, or even by death.

If any man, except a creditor or a *Bráhmana*, by fraud or by violence, and causing much pain and so forth, (for " pretence" is expressed in the plural number,) get into his hands the goods of another, whether they be things bailed or otherwise, (for the precept is general ;) he shall, together with his accomplices, be punished by various degrees of corporal pains, short of death, or even by death ; that is, by a blow with the hand or with sandals, or by cutting off the hand or foot, or even beheading, according to the value of the goods, the qualities of the man, his class, and the like. First taking the goods, afterwards behead him, or otherwise punish him.

" By false pretences ;" by frauds of various kinds. " His accomplices ;" those who have assisted him in getting into his hands the goods of another. " Publickly ;" in an open place. CHANDÉSWARA.

He who obtains the goods of another by fraud, under a false pretence, (telling him, " the king is angry with thee, I will save thee, give me something ;" and thus receiving, as a gratuity, wealth, a female *slave*, or the like ;" shall, together with his accomplices, be punished by the king, in the presence of many people, by various degrees of punishment, such as mutilation of hand or foot, beheading, and the rest. CULLÚCABHATTA.

40.

Matsya purána :—He who restores not a thing really deposited, and he who demands what he never bailed, shall both be punished as thieves, or shall pay a fine equal to double the value of the thing claimed.

This text is reconciled by CHANDÉSWARA to the text of MENU (37), by directing, that the fine shall be equal to the value, or to double the value of the thing claimed, according to the good or bad general conduct of the person to be punished. Any other than a *Bráhmana*, if vicious, shall be punished as a thief ; if virtuous, shall pay a fine equal to the value of the thing : But a *Bráhmana*, if vicious, shall pay a fine equal to double the value of the thing ; if free from vice, a fine equal to the value only. Any other than a *Bráhmana*, who, by false pretences, gets into his hands the goods of another, shall receive corporal punishment proportionate to the case ; but a *Bráhmana* shall incur the pecuniary punishment, substituted for corporal punishment, as declared under the title of Theft : such is the modern interpretation.

If the goods of another be obtained by false pretences, various degrees of corporal punishment shall be inflicted on the offenders. The fraudulent depositary shall be punished as a thief, if the deposit consist of gold, gems, pearls, or the like. In the case of a trifling demand, the fine shall be equal to the value of the thing, if it concern any other than a *Bráhmana*, and his general conduct be good; but equal to double the value, if his morals be not good. A *Bráhmana* shall never be punished like a thief, whether the value of the deposit withheld be considerable or trifling, nor if the thing have been obtained under false pretences, but he shall pay a fine equal to its value. Such is the mode according to the opinion of CHANDÉSWARA. But, according to CULLÚCABHATTA, any other than a *Bráhmana*, who obtains gold, gems, pearls or the like by false pretences, or withholds a deposit consisting of such valuable effects, for a second offence shall be punished as a thief; but if the thing be of trifling value, he shall pay a fine equal to its worth. It certainly follows, that in all cases a *Bráhmana* shall pay the value of the thing. Or, a fine equal to double the value of the thing (40), may be applicable to the case of a *Bráhmana*, on a second offence, if gold or pearls or the like be demanded; but the fine shall be equal to the value only for a first offence, whoever be the person, or whatever be the thing. MENU mentions incidentally punishment by death and so forth, in the case of a man who obtains the goods of another by false pretences.

Some hold, that he who restores not a deposit, or who embezzles it, and he who falsely claims a deposit, and *thus* obtains the goods of another by false pretences, shall be punished as thieves, if they be vicious and devoid of all virtue: but if neither vicious or virtuous, or both vicious and virtuous in equal degree, they shall be amerced in double the value of the thing; and if virtuous, and not vicious, in the value only. By the term "not restoring a deposit," is intended imposition by artful discourse, not the concealment of the deposit; but embezzlement is the fraudulent withholding of the deposit: the fraudulent withholder covetously desires to appropriate the thing by false assertions; he is described by CULLÚCABHATTA. Since corporal punishment cannot be inflicted on a *Bráhmana*, the punishment substituted for it, under the title of Theft, must be understood in the expression "punished *as thieves*." In the second text, quoted from MENU (38), "shall be punished as thieves," must be fetched from the preceding text, (37): and the latter text (39) gives some detail on the punishment of thieves. The texts of other Sages (36, 1, &c.), intimating a fine equal to the value of the thing, relate to the case of a man who is in general virtuous and free from *all* vice. Of the various ancient and modern opinions, one is to be selected; many have been mentioned for discussion.

CÁTYÁYANA propounds a distinction on bailments for a stipulated time.

41.

CÁTYÁYANA:—A deposit (*upanid'hi*) shall be recovered at the time stipulated; but let the *owner* leave it until the period expire: when that does expire, if the depositary restore not the thing, he shall be compelled to pay double the fine.

"Recovered" by the bailer, "at the stipulated time;" at the fixed time for receiving it back. "Until the period expire;" whilst less than

that time is elapsed. Hence he shall recover it when the period is elapsed, and not before. But a depositary, not restoring the deposit when the full period is expired, shall be chastised. The *Retnácara*.

Whatever fine, for whatever kind of property, has been declared in the case of a thing bailed without stipulating a period, double that fine shall, on the authority of the law, be paid by him who does not restore, at the stipulated time, a thing of a similar kind which had been bailed for time. It follows, that, in the case where the fine is ordained at double the value of the thing bailed, he shall pay four times the value if it was bailed for time.

Simple men hold, that "double the fine" intends double the value including the fine: the fine shall be equal to the value of the thing, and the value shall be paid to the owner. This supposes a case where the depositary is in general virtuous: and the text intimates, that there is no fine if a thing bailed for time be refused before the time expire.

But others interpret the text, 'when a period is not stipulated,' instead of "when the period does expire." If the depositary restore not the thing on demand, he shall pay double the fine, that is, double the value including the fine; and they apply this hemistich to the case of a thing bailed for no stipulated time, provided the depositary be in general virtuous. Others again explain "double the fine," double the sum as a fine: consequently the depositary shall pay double the value of the thing by way of fine; and they hold, that this is consistent with the opinion delivered in the *Retnácara*, where this text is considered as relating to the same subject with the text is of the *Matsya purána*. This opinion, in part comprehending that of others, seems satisfactory.

"A deposit" (*upanid'hi*) is here employed in a general sense (v. 8).

42.

CÁTYÁYANA:—He who, having received a loan for use, does not return it, though required *by the owner*, shall be compelled to restore it by harsh reproof, or shall be amerced if he *still* refuse to restore it.

Having borrowed ornaments for decoration, an awning or the like for a company, and so forth, if he do not restore them, though demanded by the owner, the king, reproaching him in opprobrious terms, shall require him to return them: if even then he restore them not, he shall be amerced; and the fine may be equal to the value of the thing, as before directed. For CÁTYÁYANA applies the law respecting bailments to loans for use and the like, declaring, that "these rules are propounded for all deposits (*upanid'hi*)." But the additional text intimates a distinction, which will be mentioned by and by (51).

It must be considered, that if a creditor, having artfully obtained from his debtor an awning or the like, refuse to restore it, employing legal deceit, as authorized by VRÍHASPATI, for the recovery of the debt, he is not to be reproached, but shall be made to give credit for it in payment of the debt; and that supposes the period for which the loan was made to have expired, and the debtor to have neglected, or to be unable to pay the debt. But if the period have not expired, he cannot employ artifice. And further the same rule is applicable to deposits and the like, according to circumstances.

A distinction is mentioned in the case of loans for use:

43.

CÁTYÁYANA:—When it is borrowed for a particular purpose, or a specified time, if it be demanded when the purpose is only half accomplished, it shall not be recovered, nor shall the borrower be compelled to restore it.

If a man have borrowed an awning for the company entertained at the nuptials of his son, the owner cannot take it back on the day of the nuptials, after one watch of the day is passed; for the purpose is only accomplished in part. But it may be taken if the purpose have been fulfilled: it certainly cannot be exacted if any part of the purpose be yet unaccomplished. So, if ornaments or the like be borrowed to be worn a month, the ornaments cannot be taken back before the end of the month: and the wearer of the things borrowed shall neither be amerced, nor reproached.

A further distinction is mentioned:

44.

CÁTYÁYANA:—But where the owner's purpose would be disappointed from the want of that thing, the borrower may be compelled to restore it before the time stipulated, even though his purpose be only accomplished in part.

"Where the owner's purpose would be disappointed" (*vipatti*); where his business would go to ruin, according to the literal sense of the verb *pad*, move. Consequently, if the owner's business would be exposed to disappointment for want of that thing, it may be taken back by him before the period expire, even though the borrower's purpose be only half fulfilled; meaning generally, though it be not fully accomplished. If the borrower refuse to restore it immediately, he may be fined or reproached, according to circumstances.

It must be understood, that all these rules provide against fraud. Therefore, when a thing borrowed to be used a month, is sent to another province, and the owner happens to need the thing, but it cannot be brought back, the borrower shall not be fined or reproached, though the owner's purpose be disappointed: but the borrower must mention, at the time of borrowing the thing, that he intends to send it to another province. This must be considered as deducible from plain reasoning.

What is to be done in a suit wherein a deposit is alleged by one party and denied by the other? There must be a trial by ordeal (15).

"A deposit is declared to be of two sorts." A deposit authenticated by a writing is not distinguished by any Sage. This meaning is there denoted: without a purpose of his own, a depositary does not execute a writing; but the depositor causes the bailment to be attested. Why is it said, under the title of Loans, that a written acknowledgement of a pledge shall be given by the creditor to the debtor? The answer is, as a loan is made from a desire of gain, so a writing is executed by the creditor from a wish to confer a favour while he takes a pledge, by furnishing grounds for confidence that the thing shall be received back. But some admit a deposit authenticated by a written contract.

"It must be restored in the condition and manner in which it was bailed" (v. 15): the deposit, whether sealed or open, attested or unattested,

must be received back in the same manner in which it was bailed. If altered, or denied, there must be a trial by ordeal: without it, the deposit is not established on the simple assertion of the plaintiff.

Two modes of proof are declared for the two sorts of deposit; attested, and privately bailed.

45.

VRIHASPATI:—Him who is convicted by the evidence of witnesses, or by ordeal, of secreting a deposit received, let the king compel to restore the deposit, and to pay a fine equal to its value.

If an attested deposit be denied by the depositary, let the king, ascertaining it by the evidence of competent witnesses, compel him to restore it; and, ascertaining by ordeal a thing privately bailed, let him compel the depositary to restore it. On the authority of the text of YÁJNYAWALCYA, ("on failure of each of these, ordeal is ordained in each case,") proof by ordeal is admitted by the author of the *Mitácshará*, on failure of evidence.

46.

MENU:—The king must decide the questions, after friendly admonition, without having recourse to artifice; for, the honest disposition of the man being proved, the judge must proceed with mildness.

Omitting reproaches and artifice or the like, such as bailing other effects to him, let the king decide the question after friendly admonition, and not hastily direct a trial by ordeal; or, considering the character of the man, and knowing his honest disposition, let the judge proceed with mildness. The text, thus expounded by CULLÚCABHATTA, forbids hasty recourse to ordeal. Therefore recourse must be had to sensible proofs.

47.

MENU:—He who restores not to the depositor, on his request, what has been deposited, may first be tried by the judge *in the following manner*, the depositor himself being absent.

2. On failure of witnesses, let the judge actually deposit gold, *or precious things*, with the defendant, by the artful contrivance of spies, who have passed the age of childhood, and whose persons are engaging.

3. Should the defendant restore that deposit in the manner and shape in which it was bailed *by the spies*, there is nothing in his hands for which others can justly accuse him:

4. But if he restore not the gold, *or precious things*, as he ought, to those emissaries, let him be apprehended and compelled to pay the value of both deposits: this is a settled rule.

If the depositary do not restore the thing, though required by the depositor, let him be sued before the king. Let the judge immediately demand it of the depositary with mild expostulation, without threats. If the depositary, apprehending the disgrace of a fine, or of corporal punish-

ment, which it is the king's duty to inflict, and reflecting that he cannot conceal the fact, acknowledge the deposit, he shall be compelled to restore it; and in this case there is ordinance exempting him from a fine. But if he do not acknowledge the deposit, let it be tried by oral evidence: this appears from the mention of "failure of witnesses." If there be no witnesses, (the deposit having been privately made, or the witnesses being dead,) the legislator directs, "let the judge actually deposit gold, *or precious things*, with the defendant, by the artful contrivance of spies, apt in detecting secret practices, who are neither very old nor very young, and whose persons are engaging:" meaning generally spies qualified for the employment. By artful contrivance or stratagem, actually depositing gold belonging to himself, let him try the matter: the text should be so supplied. The legislator subjoins the rest: should the defendant's veracity be unimpeached in every respect, the deposit being kept *and restored* as it was bailed, he must be acquitted of the offence for which he is accused by the claimant: because, were he dishonest, he would secrete the thing bailed by disguised emissaries. Let the judge also try the honesty of the supposed depositor; and if both appear honest, let him have recourse to some other mode, ordeal or the like: such is the induction of common sense. "But if he restore not the gold," let him be compelled, by harsh reproof, to make good both sorts of deposit, sealed and opened;* and the reproaches and punishment shall be proportioned to the trouble he has occasioned. The *Retnácara* and the rest concur in this interpretation.

Here a doubt may occur, should the supposed depositary, or depositor, be acquainted with the rules of judicial procedure. If the man do not act dishonestly in regard to the thing bailed by emissaries, though he be dishonest in regard to the deposit claimed, his practices cannot easily be detected. For this purpose much labour must be employed. Let the judge, night and day, place spies in disguise, on all sides of him, and near the walls of his house, that it may be known, by means of such emissaries, what conversation he holds with his intimate friends at various times, and what his occupations are: the mode mentioned by the Sage is merely an example.†

CHANDÉSWARA expounds "artful contrivance," stratagem. He who interrogates *(prich'hati)*, is the interrogator *(prát)*. He who pronounces

* The translation of the text, as given in the Institutes of Hindu Law, Chap. viii, v. 184 has been followed in preference to this interpretation.

† The compiler takes occasion to relate a popular tale.—A soldier, intending to travel to a foreign country, and wishing to place in other hands his property, consisting of gold and silver, put it into a jar of oil, which he delivered into the hands of an oilman, saying, "keep this jar of oil for me." The oilman, suspecting, from its great weight, that the vessel contained some metallic substance, took out the gold and silver, and filled up the vessel with oil. The soldier returning, received back the jar of oil, and missing the gold and silver, demanded his property from the oilman. He replied, "this is the very jar of oil which was intrusted to me; take it away: I know not what it contained." The suit was carried before the king, who, after much investigation, told the oilman, "I will give an answer, after making trial of your honesty; let this wooden chest remain in your house one night; on your bringing it back in the morning, the question shall de decided." Placing in it a sensible and learned man furnished with paper, pen, and ink, he delivered to the oilman an old wooden chest, in the lid of which many holes were bored. The oilman having received it, at night, in conversation with his wife, said, "this king tries my honesty, by depositing a thing of his own with me; am I such a theif, that, embezzling the king's deposit, I should incur punishment? Obtaining the king's confidence by restoring the chest with its contents in the morning, and cheating the soldier, I shall live in affluence upon the valuable property gained from him." The concealed spy wrote down the whole of this and the rest of their conversation. In the morning, the oilman being brought before him, together with the chest, the king, informed of the whole circumstance by the notes taken down by the man who was concealed in the chest, inflicted due punishment on the oilman, and compelled him to restore the effects to the soldier.

(vivacti), is the pronouncer *(vivác)*: first the judge *(prád'vivác)* is interrogator, next pronouncer *of judgment* ; an apposition in the form called *carmad'háraya*, as in the example, 'bathed and anointed.' Having first inquired all circumstances from the plaintiff, the judge *(prád'vivác)* himself pronounces what is proper: he is an officer of the king.

If it be alleged by the depositor, that a hundred *suvernas* were bailed, and it be proved by witnesses, or by any other popular proof, or by ordeal, that fifty *suvernas* were bailed, the following text shows what is to be done by the king in that case:

48.

MENU :—*Regularly*, a deposit should be produced, the same in kind and quantity as it was bailed, by the same and to the same person by whom and from whom it was received, and before the same company *who were witnesses to the deposit:* he who mistakes a deposit, ought to be fined.

The depositor who claims more, and the depositary who acknowledges less than was deposited, ought to be fined. Such is the meaning according to the *Retnácara* ; and in this CULLÚCABHATTA concurs. "Before the same company" is mentioned to denote witnesses, but it is merely an example: consequently, the rule is the same if the ascertainment be made by other popular proof, or by ordeal. He shall pay a fine equal to that part for which a falsehood was asserted; not equal to the whole of the effects claimed, nor to the value of the thing *actually* deposited: for the offence is less.

49.

MENU :—Such is the mode of ascertaining the right in all these cases of a deposit: in the case of a deposit sealed up, the bailee shall incur no censure on the re-delivery, unless he have *altered the seal*, *or* taken out something.

He shall incur no censure if he have taken out nothing from a sealed deposit, but he shall incur censure if he have taken out anything ; and, if he take out anything from an open deposit, he shall incur no censure if he afterwards restore it. The *Retnácara.*

We say, such is the mode of ascertaining the right and recovering the deposit, (namely, the mode abovementioned 47, 2) in all these cases of deposit, (meaning generally all deposits, loans for use, and the like:) consequently, in the case of any deposit, or loan for use, if the depositary acknowledge the receipt of silver, and the depositor allege a bailment of gold ; or if the contest regard the quantity ; it shall be tried by the evidence of witnesses by artifice, or the like, as directed by the former text (47, 2). But, in the case of a deposit sealed up, if it be proved that the depositary did not break the seal, and after taking out something seal it up again, he shall incur no censure or disgrace. Herein CULLÚCABHATTA concurs.*

* The compiler takes occasion to insert in his text another popular tale.—A rich man placed in the house of a friend two jars filled with effects, having closed the mouth of each jar with lac, on which his own seal was impressed. Some time after his death, his son, inspecting his father's notes of his income and expenditure, and of the disposal of his property, and finding a note of those two jars, claimed them: and the depositary accordingly restored them. The owner's son, opening both vessels, found gold coins in one, and pieces of iron in the other. Upon this he addressed the depositary : "Where pieces of iron intrusted to thee by my father? restore to me the gold coins." The other replied, "both jars remain as they

50.

MENU :—Thus let the king decide causes concerning a deposit, or a friendly loan for use, without showing rigour to the depositary.

In the mode before directed, without showing rigour to the supposed depositary. So the *Retnácara.* The gloss of CULLÚCABHATTA is similar.

By this it is expressed, that, in ascertaining the right in the case of a deposit, rigour and deceit, and other expedients propounded by VRĬHASPATI, shall not be employed against the supposed depositary, as in ascertaining the right and so forth in cases of debt. If it cannot be ascertained by popular proof, such as the evidence of witnesses and the like, it shall be tried by ordeal (13). Proof by ordeal is directed for both parties, the supposed depositor and the supposed depositary: so the text is explained in the *Retnácara.* Consequently, in a suit wherein one party alleges a deposit which the other denies, ordeal is ordained to determine the right: to answer the question, whether the supposed depositor or depositary shall submit to ordeal, the text directs both parties, *that is either party.* In this case the rule is, that ordeal shall be performed by whichsoever party appears to surpass the other in honesty; it is not positively required that ordeal be performed by the party accused. In cases of bailment for delivery, loans for use, and the like, the trial by ordeal on failure of evidence, the decision, and the amercement, shall *in general* be the same as in the case of any other deposit (11): but a distinct fine is mentioned in the case of a loan for use.

51.

Matsya purána :—He who, having received a loan for use, does not restore it as he ought, shall be compelled to restore it by harsh reproof, or shall be fined in the first amercement.

It is here denoted, according to CHANDÉSWARA, that, if a loan for use be not restored, the fine shall not be equal to the value of the thing, but equal to the first amercement; for, nowhere otherwise explaining the text of CÁTYÁYANA (42), he cites this text, which directs the first amercement, immediately after the text of CÁTYÁYANA.

The reconciling of these texts, by discriminating the degrees of virtue in the depositary, is proper, as well as the texts of several Sages, which direct that a man who embezzles a deposit shall be punished like a thief, or pay a fine equal to the value of the thing, and the like. As the law of deposits in general is fitly extended to loans for use, and the first amercement is in some cases the punishment of a thief, we hold that this text refers to those cases. The first amercement is propounded by MENU: "now two hundred and fifty *panás* are declared to be the first *or lowest* amercement;" and it has been often explained.

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were marked with my father's seal; I know nothing of their contents." The dispute being referred to arbitrators, these hesitated on seeing the lac, on which was the impression of his father's seal, broken into pieces; and the depositor's son observed, "this seal was made by some artist, not by my father." After reflection, the arbitrators weighed the pieces of iron and the gold coins, and finding the weight of both equal, and seeing, in the *owner's* notes of the disposal of his effects, that two jars were mentioned as placed in the depositary's house, they determined that the pieces of iron were probably placed to verify the weight of the gold; and thus the parties were reconciled. Therefore, adds the compiler, in the case of a sealed deposit, the seal should be broken before witnesses, or the thing should be opened, *on re-delivery,* without breaking the seal into pieces.

As a deposit, whether sealed or open, may not be re-delivered to sons or the rest, so a loan for use may not be re-delivered to them, while the owner lives: why should it be otherwise? But with the owner's consent it may be delivered to sons and the rest, and even to a stranger.

52.

VRÌHASPATI:—He offends not if he deliver a thing borrowed for use *to another person*, with the consent of the owner.

Supplied from the gloss of the *Retnácara*: and common sense extends this very rule to open deposits and the rest. But the owner's consent should be attested; otherwise, a subsequent contest would not be obviated.

If the thing borrowed for use be lost by accident, after the expiration of the period for which it was borrowed, an equivalent must be given: for the case is similar to that of a bailment with an artist.

53.

CÁTYÁYANA:—If the artist keep the thing bailed, after the time agreed on for working it *into ornaments and the like*, he shall be forced to pay its value, even though it be destroyed by the act of GOD.

2, What is destroyed by his own act is lost to the hired *artist, and shall be made good* even earlier *than the time stipulated*; but if he have tendered it, it is lost to the owner who did not accept it.

"The time agreed on;" the number of days appointed as the period *for working the thing bailed into ornaments or the like*. "The thing bailed;" the bailment with an artist. After the time for which it was received; that is, received on a promise to deliver ornaments at the expiration of ten days, *or other similar promise*. If the artist keep the thing after that time, beyond the stipulated period, he shall be forced to make it good, even though it be destroyed by the act of GOD or of the king. Such is the meaning of the first text. What is destroyed by an act contrary to the owner's requisition, shall be made good to the owner by the hired *artist* even earlier than the stipulated time; but if he tender the thing finished in the mode directed, and the owner do not accept it, and it be afterwards destroyed by the act of GOD, it shall not be made good to the owner by the hired *artist*.

The *Retnácara*.

The meaning of this gloss is, that, where ornaments or the like are intrusted to an artist, for repair; in that case, if the artist, from his own conceit, without the assent of the owner, attempt to re-make the unbroken parts; and the ornaments, happening to be old, are destroyed; the artist shall pay the value, or deliver an equivalent to the owner, even earlier than the time agreed on for repairing the ornaments.

Others, interpreting "hired" to mean in this place artist, and reading "in the case of a thing destroyed by his act," explain "act," work different from that directed by the owner, and supply the words "*bailed to an artist*:" and the interpretation is this: "in the case of a thing bailed to an artist, and injured by his acting inconsistently with the owner's directions, the artist *shall be forced to pay its value*;" for this is inferred from what preceded. Consequently, if a part, however small, of the thing in question be

broken by working on the part directed by the owner, it must be restored to its former condition; that is, the loss falls on the artist.

The last hemistich of the *second* verse conveys this sense: if the artist, having finished the work on those parts for which the thing was intrusted to him, tender it to the owner, and he do not receive it, saying, "let it remain for the present," or desiring the work to be done in another manner, it is the owner's loss; that is, it shall not be made good by the artist. But if the artist, agreeing to do the work in another manner, fixed a time, then, should that agreement be infringed, the fault is his.

Should it be contested by the owner, that he had directed different work; and by the artist, that the very work directed was performed: in this case, the artist, even though he had tendered the thing, shall be compelled to pay its value if it be proved that different work had been directed, but not otherwise. And in every case he shall be forced to pay its value, if he had not tendered it.

Here learn incidentally what is to be done by the owner. In a case where the form of the work is disputed, let him first receive his own chattel, and afterwards contest the matter at the time of paying the artist's wages. If the artist will not deliver the thing without receiving his wages, it is no tender; in this case, witnesses should be taken. When the cause is tried at a subsequent time, the right of one party being ascertained by evidence or by ordeal, whoever is cast in the suit, the loss shall be his, even though the thing have been lost by accident. If the wages have been already paid, or it be suspected that the thing has been changed, let the owner instantly apply to the king or his officer, or take witnesses, as abovementioned.

This and other points should be understood in the case of a thing seized by the king or the like, as well as in the case of a thing lost by the act of GOD: and the same also, according to circumstances, if gold, silver, or the like, be bailed for working into new ornaments.

54.

VRĬHASPATI:—If the loss be *occasioned* by the defects of the thing bailed, the artist shall not be compelled to make it good; but if the loss happen by the artist's fault, he shall be compelled to make good what was intrusted to him for repair, *or for work*.

In the case of a loss caused by the defects of the thing bailed, (if it be unfit to bear the heat of the fire, or operation of cutting and hammering, in consequence of its being very old,) there is no fault in the artist: for example; where a gun is to be repaired of which the wood or the iron is found too weak, in consequence of its being very old. Otherwise, it is the artist's fault if it be destroyed by a pin driven through it, or the like: for example, if the gun be broken, where the wood and iron are joined, by a stroke of a hammer in a wrong place: and so in other cases.

55.

VRĬHASPATI:—If the property of another, bailed by the mode called *nyása* and the rest, be consumed, or neglected and lost even without design, the bailee himself is the man who must make them good.

Not his son, wife, or other heir. But if lost by the fault of the heir, he shall be compelled to make it good; so the text is explained in the *Retnácara.*

Since a deposit, consumed by the depositary, is equal to a debt, it ought to be recovered from the son or other heir: but this distinction is not mentioned by any Sage; and it has only been so settled by authors. If the deposit be lost by the depositary, it shall not be recovered from his son or other heir; but if lost by his son or other heir, while the depositary is alive, it shall be recovered from that heir: or it may be recovered from the father, since the son's loss may be admitted to be the father's loss, in the same manner as the law directs (Ch. IV, v. 56), that the gain made by a son before partition is the father's. If it be destroyed by a stranger, it is considered as the act of God: and the thing shall not be recovered from the depositary, but from that stranger. This is to be inferred from common sense, and from the text of Cátyáyana (27, 2).

Should the depositary lend to another the thing bailed, what is the rule in that case? It is answered, if he lend it by consent of the owner, the gain and the loss are the depositor's: and this is controverted by none. He ought not to lend it, without the owner's consent: but if he do lend it inadvertently, the gain is the owner's; for he only has property in the thing; and the depositary, like a box or the like, is merely the holder of it. If the loan be lost by the death or insolvency of the debtor, the deposit must be made good by the depositary; since it was lost by the fault committed by him in lending it. Neither a gift, a sale, nor other alienation by the depositary, is valid, as will be mentioned under their respective titles. Thus may the law be concisely stated.

According to the opinion of those who admit a thief's property in the thing stolen, the bailment of effects stolen is valid. *Let the reader* draw his own inferences on this and other *topicks.*

CHAP. II.

ON SALE WITHOUT OWNERSHIP.

SECT. I.—*On the Avoidance of Sale without Ownership.*

VRĬHASPATI :—After bailments, sale without ownership has been propounded by BHRĬGU : listen attentively to that law, which I promulge together with the particulars *regarding the production of the seller, and the justification of the buyer.*

If the depositary sell the thing bailed, what shall be the consequence? In answer to this question, the law on sale without ownership is adduced. To this *order of promulgation,* BHRĬGU also assents. "Together with the particulars" relative to the production of the seller, the justification of the buyer, and so forth. Under this title he first defines sale without ownership.

2.

VRĬHASPATI :—He who clandestinely sells an open deposit, a thing bailed for delivery, a sealed deposit, effects stolen, a pledge, or a thing borrowed for use, *or bailed to an artist, or the like* is considered as *selling* without ownership.

"Clandestinely ;" in secret. The *Retnácara.*

A chattel belonging to the man himself, delivered to another without transferring the property, is a deposit. When one intrusts his own effects to another, through the intervention of a third, the chattel so intrusted to an intermediate person, is a deposit for delivery. All this must be understood as already explained. A thing intrusted under seal is a sealed deposit: both sorts are mentioned, as a priest and a mendicant *are distinguished.* "Stolen ;" seized by thieves. "A pledge ;" a thing hypothecated. "A thing borrowed for use ;" ornaments or the like asked and obtained for decoration and so forth. This is general, comprehending bailments with artists and so forth. He by whom such a thing is sold, is a non-owner. Such is the meaning of the text. Consequently the sale effected by him is sale without ownership. This must be understood as the import *of the text ;* otherwise, the establishing of a technical sense *for the word* aswàmi (non-owner) would be superfluous, since any other than the owner, whether a depositary or not a depositary, whether a seller or not a seller, has no ownership. But now there is no difficulty in explaining the term "non-owner," as employed to denote sale without ownership.

3.

NÁREDA :—When a thing bailed, or the goods of another lost *by him* and found *by a stranger,* or effects stolen, are clandestinely sold, it must be considered as a sale without ownership.

The intrusting of one's own effects to another is bailment, as defined by NÁREDA. It comprehends loans for use and the rest, conformably with the sense of the verb *nihcshép*, bail or in trust; the law of bailments having been extended to loans for use (Chap. I, v. 3 & 11;) for there is no difficulty in extending the laws promulged under the title of Sale without Ownership to these trusts, by the comprehensive sense of the pronoun "it." "Lost;" missed by the owner. The text must be so supplied. Some person travelling on a road, drops a thing, which is not recovered though diligently sought; in such cases, the thing is lost, but not abandoned by the owner: consequently it is not a waif. When that thing is found and sold by any person, it is sale without ownership: and so when a thing is sold which had been stolen, or taken by fraud or force, in the day or night, from the owner's house, without his consent.

The relative (3) belongs to the action: consequently that sale which is made by a non-owner, is a sale without ownership; the term "*sale*," being taken in the neuter sense. Or the relative belongs in construction to the goods of another which are sold: consequently that chattel, appertaining to another, which is *thus* sold, is a sale, or thing sold, without ownership; the word "*sale*" being taken in the passive sense: and many so explain the text.

4.

VYÁSA:—When the goods of another are sold in the owner's absence, *whether they had been* borrowed for use, bailed for delivery, deposited under seal, or stolen, it is a sale without ownership.

In this text the pronoun stands in the masculine gender, because sale is masculine; as in a former text concerning secret bailments (Chap. I, v. 6) where neither the thing nor the act of depositing it, which might be intended by the pronoun, is masculine, but the word bailment *nyàsa* only *is masculine*. Any property of another, which is sold in the absence of the owner, whether it had been borrowed for use, bailed for delivery, or secretly deposited; or the property of another seized or stolen, which is thus sold, is a sale, or thing sold without ownership; but according to a former opinion, the sale of a chattel which is thus sold, though it belong to another, is sale without ownership. The difference in the construction of the text arises on the word "it" referred to the sale, or to the thing sold. Or even on this opinion the seeming difficulty may be reconciled, as before.

"Clandestinely," in the preceding texts (2 and 3), denotes the want of the owner's assent. Consequently, if the owner assent, a sale made even by one who is not owner, is valid: and such is the current practice.

5.

MENU:—Him who sells the property of another man, without the assent of the owner, the judge shall not admit as a competent witness, but shall treat as a thief, who pretends that he has committed no theft.

Treating him who sells the property of another man, unauthorized by the owner, as one who is in fact a thief, but pretends he has committed no theft, the judge shall not admit him as a competent witness; that is, he shall never admit his evidence. CULLÚCABHATTA.

But his punishment will be mentioned in another text.

The term of "sale without ownership" must be taken in its derivative sense, a sale made by one who is not owner; for MENU, the highest authority of memorial law, does not specify deposits and the like, in ordaining, that he who sells another's property, shall not be admitted as a competent witness; and it is irregular to establish another acceptation, when the derivative sense is apposite. And further, in the text of VRĬHASPATI (2) and the rest, deposits and the like are only mentioned illustratively: thus, should any powerful person sell a tree or the like, which belongs to some weaker man, pretending that it is his; on its afterwards appearing, from a judicial procedure, that he was not the owner, it is *held* a sale without ownership.

If any one of the parceners sell property which was inherited by five brothers on the death of their father, is it not a sale without ownership? and is not this inconsistent with the opinion delivered by authors in explaining the following text; namely, that the gift, *or sale*, ought not to be made; but if made, is valid?

6.

VYÁSA:—A single parcener ought not, without the consent of his co-parceners, to sell or give away immoveable property of any sort which the family hold in co-parcenary.

It should not be argued, that, each of the five brothers having dominion over that property, a sale by a single parcener is not a sale without ownership. The separate dominion of the five brothers over the same property is not admissible, according to the opinion of JÍMÚTAVÁHANA. Nor should it be argued, that, according to his opinion, the dominion of each is established over the property which each enjoys, or which each will receive when a partition is made: and thus the property sold by the parcener was actually his; and consequently there is no difficulty. Were it so, another parcener could not share the price of that property. It is not proper to affirm, as consistent with the opinion of JÍMÚTAVÁHANA, that other parceners have no share in the price of undivided property sold by a brother with whom partition has not been made; but, according to the opinion of lawyers, who contend for the common title of all the brethren in the whole of the wealth, surely they are all entitled to a share.

To the question thus proposed it is answered, the term 'joint wealth,' according to the opinion of JÍMÚTAVÁHANA, should be used for what is brought into one common tenure; when such property is sold by any one of the parceners, the price of it is joint property; and in that case, what is enjoyed by each, becomes the property of each. Thus is the law demonstrated. And in this case, there is no punishment; nor is there a sale without ownership ascertained by proof that another's property has been sold, since it is not certain whether the seller is or is not the owner: the sale is therefore valid.

It should not be objected that a moral offence is committed, since there is in fact a want of ownership. That is admissible; a moral offence is even denoted by the expression "ought not to be made;" and the sale of joint property is forbidden, merely in the apprehension of a moral offence. In fact, the price of property sold by any one of the parceners, is enjoyed in common by all. To whom that property, which is sold, did belong, cannot well be determined, according to the opinion of JÍMÚTAVÁHANA: the dominion of all the parceners over it must be asserted, like their property in a single horse or the like.

The opinion of VÁCHESPATI BHATTACHÁRYA may be admitted upon the reason of the law: if the whole of the joint property be sold by one of the parceners, the sale is not valid so far as regards the shares of the other parceners, but is valid so far as regards the seller's own share; and if it be sold with the consent of the co-parceners, the sale of the whole is valid. This will be made evident under the title of Subtraction of what has been given.

Should a creditor, selling a pledge, apply the produce to the payment of his own debts, what is the law in that case; for he has no property in the pledge? It is not *universally so.* But if he sell it before the period ordained under the title of Loans and Payment, the sale is not valid.

7.

MENU:—Nor, after a great length of time, can he give or sell such a pledge.*

But he becomes the owner of the pledge at the appointed time.

8.

VRĬHASPATI:—After the time for payment has past, and when interest ceases, the creditor shall be owner of the pledge.†

And again,

9.

VRĬHASPATI:—When the debt is doubled by the interest, and the debtor is either dead or has absconded, the creditor may take his pledge and sell it before witnesses.‡

If the creditor become owner of the pledge, how can the expression of VRĬHASPATI be pertinent (having received the amount of his debt, he must relinquish the balance §)? for this directs that the remainder shall be relinquished: now there is no relinquishment of any part of the price, when a man sells his own property. It must be understood, that the text above cited (8) denotes property in a certain part proportioned to the amount of the debt. Or the creditor becomes owner of the whole pledge, if the agreement were in this form, "should I not redeem the pledge when the debt is doubled, it shall become thy property;" or thus, "should I not redeem it in five years, it shall become thy sole property." But if the agreement run not in such form, the property extends only to a part of the pledge proportionate to the debt. The text bears both senses.

When a piece of land measuring a thousand cubits, or when twenty trees have been pledged without an agreement in such form, if the debt can be liquidated by the sale of half the pledge, shall the whole be sold or not? It is answered, the whole should not be sold; for the sale is only directed for the payment of the debt. It should not be objected, that, were it so, the text directing the relinquishment of the remainder would be unmeaning.

* Book I, v. 117. The text would admit of a different interpretation, which seems to be here intended.

† Book I, v. 115.

‡ Book I, v. 121, 1.

§ Book I, v. 121, 2.

When a single copper vessel or the like has been pawned, since a part of it cannot be sold, the sale of the whole is necessary; and it is necessary that a part of the price (namely, the surplus) should be relinquished. Nor should it be argued, that, were it so, the creditor being owner of a part only, the sale of the other part would be a sale without ownership. Like the case of undivided brethren, a partial ownership, without property in the whole, is incongruous.

What then is this partial ownership? It should not be called a concurrent property contemporary with the property vested in the debtor or in his heir: for in that case each would be equally entitled to half the pledge. This is concisely answered by establishing an ownership, on the authority of the law, in a greater or less value, according to circumstances.

When the king causes the property of any person to be sold, what is the law in that case? Why does the king cause it to be sold? By an act of violence; or for the payment of a fine, or of a debt? In the first case the sale is not valid.

10.

MENU:—What is given by force, what is by force enjoyed, by force caused to be written, and all other things done by force, MENU has pronounced void.

In the second case, if he do not cause the property to be sold, how can the amercement or debt be recovered? It should not be objected, that there is no occasion for his making the sale himself, since the purpose may also be effected by selling the property through *the* intervention *of the owner*. It is inconsistent with settled usage to suppose an offence in selling the property in the owner's presence, if he refuse to cause it to be sold. Nor is it void, as a thing done by force; for what is done by force without a *sufficient* cause, is alone void; and fines could not otherwise be recovered.

Some ground the validity of a sale made by the king, on his being lord of all, as declared by the text, "All subjects are dependent, the king *alone* is independent." But, were it so, the king's interest and the buyer's interest in the thing would be equal; and therefore the subject's right could not be vindicated: and further the sense positively is, that the sale of the owner's property ought to be made by the king with the owner's consent. But, if that owner do not consent to the sale of his effects for the payment of a just due, let the king compel him to consent, by blows, or harsh reproof, or other modes authorized by the law. Or, should he persist in his refusal, a reasonable punishment, for the offence of not assenting where assent is required, is proper.

But if the king, being much hurried, sell the effects without requiring the owner's attendance, and the owner, afterwards attending, contumaciously refuse to pay what was due, or to acknowledge the validity of the sale, then that contumacious person shall be compelled by harsh reproof, or other suitable mode, to admit the sale.

But should he attend and pay what was due, how can the sale be valid? The king cannot employ violence to render the sale valid; for an acknowledgment extorted by force would, in this case, be void (8); that is, it would be void in the case of a payment for which no time was stipulated. But if a period had been stipulated, and his conduct be contumacious after

the period has expired, what has been already said concerning the sale of a pledge is equally applicable to this case.

The sale of a pledge may be valid, because it is a thing actually possessed; how can other effects, remaining in the owner's house, be sold by the king's permission? It should not be argued that the sale is valid, because it is made by a person not destitute of authority, the king being lord of all, and the text of MENU merely declaring void a contract made by a person without authority. CULLÚCABHATTA expounds "a person without authority," a person not authorized by the father or by the brethren.

11.

MENU:—A contract made by a person intoxicated or insane, or grievously disordered, or wholly dependant, by an infant or a decrepit old man, or by a person without authority, is utterly null.

The law ordains, that the king shall not cause the property of another to be sold: but he shall enforce payment of a debt, or the like: and the meaning is, that he shall induce the debtor to discharge it.

How can the property of another, received in pawn, be enjoyed as a forfeited pledge, with the king's consent, under the words of the text cited in the preceding book (Book I, v. 120)? and how can the goods of another be sold by the king's directions, under the authority of another text (Book I, v. 122)? For the goods, though actually possessed, are the property of another.

If the debtor do not redeem the pledge at the stipulated time, it is not required that the creditor should keep the pledge; for the law shows that the debtor's property in it is forfeited by his neglect. Let the creditor enjoy it, or cause it to be sold, previously acquainting the king for the sake of respect, or of justifying the act. To this construction there is no objection: and if this exposition be proposed, it is admissible.

If a time were stipulated, the sale of the effects with the owner's consent is valid in law. Therefore it is consistent with the reason of the law, that, after the stipulated period has expired, sufficient effects should be attached to provide for the payment of what is due from a person who has absconded, and that they should be sold after a *reasonable* delay. But there is a distinction in respect to land.

Disquisition on Property in the Soil.

This earth, created by GOD, became the wife of PRĬT'HU; and afterwards, by marriage and otherwise, became the property of several princes.

12.

Narasinha purána:—Thrice seven times exterminating the military tribe, PARASU RÁMA gave the earth to CASYAPA as a gratuity for the sacrifice of a horse.

By conquest, the earth became the property of the holy PARASU RÁMA; by gift, the property of the Sage CASYAPA; and, committed by him to *Cshatriyas* for the sake of protection, became their protective property successively held by powerful conquerors, and not by subjects cultivating the soil.

But annual property is acquired by subjects on payment of annual revenue : and the king cannot lawfully give, sell, or dispose of the land to another for that year. But if the agreement be in this form, "you shall enjoy it for years ;" for as many years as the property is granted, during so many years the king should never give, sell, or dispose of it *to another*. Yet if the subject pay not the revenue, the grant, being conditional, is annulled by the breach of the condition ; and *the king* may grant it to another.

But if *no special agreement be made, and* another person, desirous of obtaining the land, stipulate a greater revenue, it may be granted to him on his application. Here reasoning must be adduced: For example, the following : it must of necessity be affirmed, that the cultivator has not an absolute property in the land ; otherwise the cultivator would take the sixth part of the produce of unclaimed land, which has been obtained as such by another.

13.

YÁJNYAWALCYA :—Let the king, receiving unclaimed property, give half to *Bráhmanas :* but a learned *Bráhmana* may keep the whole, for he is lord of all.

2. And the king shall receive a sixth part of unclaimed property occupied by any other person.

If the king himself receive unowned property anywhere situated, let him give half to *Bráhmanas ;* for the word *dwija* or *twice-born* here signifies the *Bráhmana,* as is shown by the subsequent expression "he is lord of all ;" since no twice-born man, except the king and the *Bráhmana,* is lord of all ; and MENU declares the dominion of the king and the priest over the human species (24). A learned *Bráhmana,* occupying unowned property, may keep the whole. But any other than a *Bráhmana* or king, occupying unowned property, must give a sixth part to the king, and may take the remainder himself.

Must the king, receiving from a subject the sixth part of unclaimed property, give half to the priest ? The answer is, unclaimed property denoting a thing which has no owner, and, when it is occupied by a private person, the property by occupancy altering the condition of that thing, the king does not in this case receive unclaimed property ; therefore half need not be given to the priest.

Since the word 'king' here denotes lord of the soil ; and since the cultivator, being owner of that land, is *so far* equal to the king, he would be entitled to the sixth part of the unowned property occupied by him. *The answer is,* the word 'king' may be explained lord of the soil, to exclude another king : but a royal property is supposed in the use of the word ; the cultivator has a subordinate usufructuary property, not a royal property : and SRÍ CRĬSHNA TERCÁLANCÁRA things there may be, in the same land, property of various kinds, vesting in the king, the subject, and so forth. It should not be objected, if that be the case, why cannot the king give the land to another in the same year *for which revenue is paid ?* Because a seller or giver may, by sale or gift, annul his own property, and invest another with similar property, but cannot create property, of another nature

(for a sale by a subject cannot create property of another nature, namely, royal property;) therefore, usufructuary property being raised by a conditional gift to the subject, the king cannot again create property *in the same thing*, by a gift to another.

But whence is it deduced that such property vests in the cultivator? There is no proof of it. His property is not by occupancy; for, the king being a more powerful owner, his occupancy cannot be maintained: it is not by sale; for no sale has been made: it is not by gift from the king on condition of revenue; for, were it so, his property would be equal to the king's.

If it be said, the king, satisfied with the receipt of revenue, does not oppose a property by occupancy; the answer is, in that case the property would remain, if the husbandman, not having surrendered that land, stay even in a distant country; and thus the land could not be taken by another person. It is not fit that, property being established by occupancy while the king was satisfied, he should, afterwards becoming dissatisfied, have power to annul the occupancy or property; for occupancy, having created a property, immediately ceases *to be a mere occupancy*; and property cannot be annulled without the assent of the owner.

Some hold, that the subject is invested with ownership by a gift from the king on condition of revenue. If he go elsewhere, and revenue be not paid, the gift is cancelled by the breach of the condition. It should not be objected that his interest in the land would be equal to the king's; for the king's assent is not *given* in such a form. Thus, the king assenting in these words, "let a subordinate usufructuary property be held by thee, while my property remains in this land, which belongs to me;" such property is created as is described by the terms of his assent. Nor should it be objected that in this case property is not created, nor is effect given to an existent property, but mere possession as of a thing pawned. This would be inconsistent with the explanation of husbandman, as given by CHANDÉSWARA and others; that is, "owner of the field." Nor should it be objected; how can there be property in what is already owned, since property resists a concurrent property? SRÍ CRĬSHNA TERCÁLANCÁRA and others hold, that property prevents concurrent property of the same nature only: and, under the text which declares wealth common to the husband and wife,* the wife has property even while the husband's title subsists. If it be argued, that, in short, property generally prevents a concurrent property; and the text, which declares wealth common to the husband and wife, merely authorizes her substitution for the duties of hospitality and the like; and the difficulty being thus removed, there is not, in the case supposed, any property vested in subjects: then the husbandman would only receive half the produce of the soil, since the king would be entitled to enjoy the proportion to which *the owner of* the soil is entitled. If it be argued, that, obtaining the land by payment of revenue, as a wife is obtained by a nuptial gift, he who raises produce from his own seed, is entitled to that produce: even in that case, as a thing hypothecated to one person cannot be also hypothecated to another, so possession of land, already possessed by one person, cannot properly be given to another. A specifick agreement should be made, when the land is delivered, that it shall be enjoyed year by year, until a greater revenue be offered by another person.

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* Book V, v. 415.

14.

MENU :—Having ascertained the rates of purchase and sale, *the length of* the way, the expenses of food and of condiments, the charges of securing the goods carried, and the neat profits of trade, let the king oblige traders to pay taxes *on their saleable commodities:*

2. After full consideration, let a king so levy those taxes continually in his dominions, that both he and the merchant may receive a just compensation for their several acts.

3. As the leech, the suckling calf, and the bee, take their natural food by little and little, thus must a king draw from his dominions an annual revenue.

4. Of cattle, of gems, of gold and silver, *added each year to the capital stock*, a fiftieth part may be taken by the king; of grain, an eighth part, a sixth, or a twelfth,

5. He may also take a sixth part of the clear annual increase of trees, flesh-meat, honey, clarified butter, perfumes, medical substances, liquids, flowers, roots, and fruit;

6. Of gathered leaves, pot-herbs, grass, utensils made with leather or cane, earthen pots, and all things made of stone.

7. A king, even though dying *with want*, must not receive any tax from a *Bráhmana* learned in the *Védas*, nor suffer such a *Bráhmana*, residing in his territories, to be afflicted with hunger.

8. Of that king in whose dominion a learned *Bráhmana* is afflicted with hunger, the whole kingdom will in a short time be afflicted with famine.

9. The king, having ascertained his knowledge of scripture and good morals, must allot him a suitable maintenance, and protect him on all sides, as a father protects his own son:

10. By that religious duty which such a *Bráhmana* performs each day, under the full protection of the sovereign, the life, wealth, and dominions of his protector, shall be greatly increased.

11. Let the king order a mere trifle to be paid, in the name of the annual tax, by the meaner inhabitants of his realm, who subsist by petty traffick:

12. By low handicraftsmen, artificers, and servile men, who support themselves by labour, the king, may cause work to be done for a day in each month.

13. Let him not cut up his own root *by taking no revenue*, nor the root of other men by excess of covetousness; for, by cutting up his own root *and theirs*, he makes both himself and them wretched.

Let him levy taxes on traders, who subsist by purchasing commodities cheap, and vending them at an advanced price. What taxes? To this the legislator replies, having ascertained the rates at which commodities are purchased, and at which they are sold; and having ascertained the profit, with the charges of travelling, of subsistence, of transport, and of safeguard after importation, let him levy taxes: that is, let him take the due proportion of the sum which remains after defraying all charges. RAGHUNANDANA expounds the terms of the text *(yógacshéma)* transport of goods to be imported, and safeguard after importation. Let the king so act, that he also may receive benefit out of the profits of trade *which remain* after defraying charges, and that the merchant may receive just compensation for his labours.

15.

PARÁSARA:—Let the king gather blossom after blossom, like the florist in the garden; and not extirpate the plant, like a burner of charcoal.

As the florist in the garden plucks blossoms successively put forth, and does not eradicate the flowering shrub; so should the king, drawing revenue from his subjects, take the sixth part of the actual produce: but the maker of charcoal, extirpating the tree, burns the whole plant; let not the king so treat his subjects. MÁD'HAVA.

16.

The *Mahábhárata*:—Let the king gently draw *revenue* from his dominions, as the leech *takes its natural food by little and little.*

The fiftieth part, and other proportions of the profit gained by commerce, must be understood generally of all profit; for no distinction is mentioned.

17.

VRIHASPATI:—Giving a sixth part to the king, a twenty-first part to deities, and a thirtieth part to priests, a man offends not by applying himself to agriculture.

From the concurrence of this text, and no distinction being mentioned, this very rule must apply to the receipt of a part of the gain in all cases: and MÁD'HAVA places the text of MENU under the title of Revenue in general.

"Of grain, an eighth part, a sixth, or a twelfth:" *three* rates, primary and secondary, for the difference of circumstances. Consequently, a greater revenue is permitted in the exigence of distress. But never shall any tax be received from a *Bráhmana* learned in the *Védas* (14, 7). Shall not the king prevent his cultivating land, and thus there will be no revenue to receive from him? The text declares it infamous, that such a *Bráhmana* should be afflicted with hunger (14, 8). Therefore the king should assign a suitable maintenance to a learned *Bráhmana*, who has not a maintenance already allotted to him. To confirm this, MENU himself adds: "the king, having ascertained his knowledge of scripture and good morals, must allot him a suitable maintenance;" that is, such a maintenance as may exempt him from falling into contempt. Do not the subjects pay a sixth part as a token of respect, because the king protects them? And, if the *Bráhmana* learned in the *Védas* pay not a sixth part, shall not the king protect him? To those who entertain this doubt, the Sage replies: "the king must

protect him on all sides," from thieves and others, not in words merely, but with *exertion of* mind and body, as a *father protects his* son.

To the doubt abovementioned, founded on the mistaken notion that such a *Bráhmana* does not give a sixth part, is it not answered, that he who raises produce, or buys and sells things, gives a part of them; and as the *Bráhmana* learned in the *Védas* acquires merit, of which he gives a part, he also must necessarily be protected by the king?

18.

The divine CÁLIDASA:—The wealth of princes, collected from the four orders of their subjects, is perishable: but pious men give us a sixth part of the fruits of their piety; fruits which will never perish.*

How does it follow that *Bráhmanas* learned in the *Védas* give the sixth part required by the text of VRĬHASPATI? The text cannot be well explained by the gift of a part of the fruits of piety; for that is inconsistent with the concurrent gift of a part to deities and priests. Some refer the text (17) to others than a *Bráhmana:* but that is not the opinion of MÁD'HAVA; for, immediately after that text, he mentions the mode in which agriculture may be practised by a *Bráhmana*, and quotes a text of MENU concerning the practice of husbandry by *Cshatriyas* and others. The difficulty may be thus briefly reconciled: if a *Bráhmana* learned in the *Védas*, for his own justification, voluntarily pay revenue, let the king, receiving it, appropriate it to the use of deities and priests; but if he pay it not spontaneously, the king must not demand it.

The sixth part is explained by MÁD'HAVA, one part in six. By parity of reasoning, the rule is the same in respect of the thirtieth part.

19.

MENU:—A sixth part of *the reward for* virtuous deeds, performed by the whole people, belongs to the king, who protects them; but if he protect them not, a sixth part of their iniquity lights on him.

Under this text, which includes all classes, the king, who protects his subjects, receives a sixth part of *the reward for* virtuous deeds performed by them, although they also pay revenue. What parity is there in comparison with the *Bráhmana* learned in the *Védas*, since the people at large give part both of the wealth and merit acquired by them? It must be understood, that the contribution is equal, or even greater, since a virtuous *Bráhmana* learned in the *Védas*, acquiring great merit, gives *a part of a great reward for* many virtuous deeds. A *Srótriya*, or *Bráhmana* learned in the *Védas*, is thus described:

20.

DÉVALA:—A priest who has studied one *śác'há* of the *Véda*, or one *śác'há* with the law of sacrifice, or with the six *angas* or bodies of learning, and who performs the six prescribed acts, is named *Srótriya* learned in law.

* *Sacontalá*, p. 41, Calcutta edition.

The six *angas*, or bodies of learning, are *śicshà*, *calpa*, *vyàcarana*, *ch'handas*, *jyótish*, and *niructi*.* The prescribed acts are declared in the following text :—

21.

MENU :—Reading the *Védas*, and teaching *others* to read them, sacrificing and assisting *others* to sacrifice, giving *to the poor if themselves have enough*, and accepting *gifts from the virtuous if themselves are poor*, are the six prescribed acts of the first-born class.

Let it not be supposed that an ignorant *Bráhmana* is not to be respected; for MENU, premising that a king, though in the greatest distress, should not provoke *Bráhmanas* to anger, declares the danger of provoking even an ignorant *Bráhmana*.

22.

MENU :—A *Bráhmana*, whether learned or ignorant, is a powerful divinity; even as fire is a powerful divinity, whether consecrated or popular.

"Let the king order a mere trifle to be paid" (14, 11) by the meaner inhabitants of his realm (inferior in rank to the priest), who subsist by cultivation and other modes before mentioned, or by handicraft and the like not previously mentioned. Another contribution from handicraftsmen and artificers is mentioned in the subsequent text (14, 12). Thus some expound the text (14, 11). But in fact the term used in the text intends *petty* traffick, and the profession of a singer and the like. In the subsequent text, labourers, such as thatchers of houses and others, and artificers subsisting by work in cane and wood, are intended: as a distinction might be supposed between persons subsisting by labor or handicraft only, and persons subsisting by the sale of the produce of their labour, both are mentioned; but in fact the terms are synonymous in the dictionary of AMERA. "By these, and by servile men, the king may cause work to be done for a day in each month," employing handicraftsmen and artificers in thatching houses, and in working on cane and wood, and employing *Śúdras* on servile labour. It is necessary they should contribute revenue: to lighten the labour, they may pay to the king an equivalent out of wealth gained elsewhere, and the king may hire others for the labour required. Thus, if the attendance of a multitude of artificers be inconvenient from the magnitude of the kingdom, he may levy taxes equal to the value of labor for twelve days in the year.

The king may levy taxes at such rates; and these rates are directed by the law in times void of distress; therefore he may not exact a greater revenue: but the prohibition against receiving any tax from a learned *Bráhmana*, even in times of distress (14, 7), implies, that a greater revenue may be received from others in such times. Let him not make himself wretched in the apprehension of transgressing the law, nor anticipating distress, or providing for his own gratifications, or desirous of amassing wealth, make his subjects wretched (14, 13). Let him not cut up his own root, that is, his life, *by taking no revenue;* nor the root of others, by excess of covetousness: such is the construction of the text. The king should preserve

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**Sicshà*, on pronunciation of vocal sounds. *Calpa*, detail of religious acts and ceremonies. *Vyàcarana*, grammar. *Ch'handas*, prosody. *Jyótish*, astronomy. *Niructi*, on the signification of difficult words and phrases.—Asiatick Researches, vol. i, p. 341.

himself for the benefit of others, for he himself protects others; and if he perish, others would not be protected. On this exposition, the receipt of greater revenue is improper; but in times of distress a greater revenue may be taken. Distress not being perpetual, if a sixth part of the crop have been stipulated at the time of granting the land to the cultivator, no distress then existing, should distress afterwards arise, it is fit that a greater revenue should be exacted, notwithstanding that stipulation. Such is the induction of common sense.

23.

MENU :—A military king, who takes even a fourth part *of the crops of his realm* at a time of urgent necessity, *as of war or invasion*, and protects his people to the utmost of his power, commits no sin.

From the circumstances of the times, if confidence cannot be placed in the subject, the value of a sixth part, or other proportion *of the crop*, anyhow ascertained, may be taken, whether the actual produce be more or less than was estimated: this method is authorized by settled usage, and is indicated *by the text*.

Others hold, that the king has no property in the soil, nor power to dispose of the subject's abode, because all have a right in the soil; since the earth was created for the support of living animals, as expressed in the *Srí Bhágavatta*: "*The earth*, which GOD created for the abode of living creatures:" and because MENU has *only* declared, that the subjects shall be protected by the king.

24.

MENU :—Since the Lord of created beings, having formed herds and flocks, intrusted them to the care of the *Vaisya*, while he intrusted the whole human species to the *Bráhmana* and the *royal Cshatriya*.

Were it so, would it not be uncertain how many subjects shall be protected by that king? To this they reply, that each king shall protect the inhabitants of that country, whereof the inhabitants can be exempted from the dominion of every other person.

But, in fact, without property in the soil, there can be no certain rule for the protection of the subjects. Let it not be said, that the rule above mentioned suffices; namely, that the subjects are to be protected in such an extent of country as can be withdrawn from the dominion of another: for, should the possibility of excluding another authority be received as naturally included in the definition, a powerful king, who from tenderness omitted to seize another realm, would be criminal in not protecting the subjects of that realm, since he is able to possess himself of it. Nor should it be argued, that the rule directs the protection of subjects in that country, from which other authority is actually excluded; for, other authority anyhow subsisting therein, it might be supposed that the king was not bound to protect the inhabitants of his own realm, so long as that authority was not exterminated.

If it be asked, what is the rule on your opinion? And if it be argued, that the positive necessity of supposing a proprietary right, and the consequent obligation on the king to protect the inhabitants of that country, of which he is proprietor, should not be affirmed, because such property is not deduced from positive precept; *we answer*, the exclusion of every other au-

thority is naturally implied, and it is positively required that there be "a right of property co-ordinate with the non-existence of a determination not to exclude other authority." It should not be argued, that the obligation of protecting the subject need only be supposed, for it is troublesome to establish another proprietary right. A king's gift of his realm is mentioned in the *Purándas* and in other works ("he gave his ancient dominions to the performer of the sacrifice"): consequently a real ownership is vested in the king. It should not be said, the gift, in the instance quoted from the *Puránas*, means a gift of the revenue payable by the subjects of his ancient dominions. The gift could not take immediate effect; for the king's property has no foundation to rest on, since the revenue is not yet paid. Nor should it be said, the property will arise at a future time, from the past existence of the act of assenting, which has only a momentary duration,* as in the case of a corrody, where a future property is created. A gift of land by the king is mentioned in a text of YÁJNYAWALCYA (Chap. IV, v. 34); and Lord of the earth *(mehipati)* and similar regal titles are *often* mentioned.

Is the earth unowned if the king have no property in it? If it be alleged that the soil is not unowned, since the subject has property by occupancy; it is asked, cannot the king occupy land? The king may also have property in the land by occupancy. Therefore the right, both of the king and the subject, in the soil, is proved upon the concurrent opinions of CHANDÉSWARA, SRÍ CRĬSHNA TERCÁLANCÁRA, and many other authors.

Property must be discriminated by occupancy: thus, if another invade the land occupied by subjects, the king opposes him, and land is occupied by subjects with the king's consent. Kings were created by GOD to decide the various contests between subjects concerning occupancy and the like, and to maintain just proceedings: therefore the king, as lord of his subjects, is called lord of men *(nerapati)*. By his own power, the king prevents others from seizing the land over which he has dominion; by his own power, he legally seizes the land over which others reign: therefore he is not subordinate to the subject.

If a potent subject be able, independent of the king, to resist invaders, and even to seize the lands of others; shall his property be deemed independent of the king? No; for that subject ought to be punished by the king, if he transgress the law: but if the sovereign be not able to inflict punishment on him, even he is king.

Any king who pays tribute to a foreign prince, is nevertheless a king, if he do not surrender his regal power. But a person who receives a village from the king, undertaking to pay the revenue of it in the expectation of benefit to himself, is an intermediate owner between the king and the subject.

This earth therefore is the cow which grants every wish; she affords property of a hundred various kinds; (inferior, if the owner need the assent of another proprietor; superior, if his right precede assent;) while she deludes a hundred owners, like a deceiving harlot, with the illusion of false enjoyment: FOR, IN TRUTH, THERE IS NO OTHER LORD OF THIS EARTH BUT ONE, THE SUPREME GOD.

The subject's property in the soil is weaker than the king's, for the subject is weaker than the king; but it is founded on the reason of the law, and on settled usage: therefore the land of one subject ought not to be sold by the king to another. But how can this sale be sale without ownership,

* This alludes to philosophical reasoning on the relation between cause and effect.

since the king is owner of the land, as well as the subject? It should not be affirmed, that the sale made by one who holds not such property as is conveyed by the sale, is sale without ownership; for this is inconsistent with the opinion of those who contend for a property in the subject dependent on a grant from the king. Thus, according to that opinion, the subject's property is founded on a grant from the king as superior lord. But, what difference is there in the effect of a gift or sale? According to the opinion, wherein it is contended that the subject's property depends on the gift of the king, so long as the inferior property is not granted, the land has only one owner: afterwards, a double property arising, an owner may annul his own property, but not the property of another person; else, why could not the subject annul the king's property, by selling his own land? Accordingly, the specifick assent of the owner being the cause of annulling property of the same nature, the king cannot annul an inferior property: and this very maxim may be maintained on the opinion even of those who contend for a property by occupancy, on the authority of the text which describes the earth as the abode of living creatures. According to this opinion, wherein property by occupancy is maintained, if any subject, occupying land, after some time go to a distant country without surrendering the land, can no other person take the land; since, without his surrender of it, his property is not annulled? The meaning of the text which describes the earth as the abode of living creatures, is positively this; the property is his who uses the land where he resides, and while he uses it: and thus, when land belonging to any person is sold by the king, it is a sale without ownership.

25.

CÁTYÁYANA:—Let the judge declare void a sale without ownership, and a gift or pledge *unauthorized by the owner*.

It must be understood from the proximity of the terms, that the gift or pledge is made by one who is not owner of the thing. Or the suffix is omitted for the sake of the metre. "Declare void;" that is, the buyer having received back the price, the owner recovers his chattel.

26.

NÁREDA:—The owner, finding a thing which had been sold by a stranger, shall recover it.

"Finding:" the term is so explained in the *Retnácara*.

The owner shall recover his own property, sold by a stranger, or one who is not owner of it: blame is imputable to the buyer; it is imputable to him because he bought not publickly, *but bought the chattel* without acquainting the king or his officers (37). If it had been stolen by a thief, he must restore the chattel if the thief be not found, as will be subsequently noticed.

27.

MENU:—A gift, or sale, thus made by any other than the true owner, must, by a settled rule, be considered in judicial proceedings as not made.

How is it called a sale, for the word "sale" implies the act of annulling former property upon the receipt of a consideration; now the former property cannot be annulled by the act of a stranger? The word "sale" is here employed in a secondary sense, denoting the delivery of a thing, with the previous receipt of a consideration.

But some argue that sale is the act of assenting to the annulling of former property, with the previous receipt of a consideration; and even gift is the assenting to the annulling of former property, but without the receipt of a consideration: and this they hold to be the sense of the verbs 'sell' and 'give.' Thus, by the authority of the law, in the case of a perfect gift or sale, the property of the former owner is annulled by his assenting to the annulling of it: but, in the present case, the former property is not annulled, though such assent be given, *but given by a stranger;* for a stranger's assent cannot annul property: on the contrary, the giver or seller shall be punished. The owner's assent to the annulling of his own property is the cause of *his* property being annulled; and *his* assenting to another's property is the cause of another's property; not generally any assent to the annulling of former property, and any assent to the raising of a property in another: for the cause and effect would be interchangeable. Thus, on that opinion, the gift or sale is truly the cause of annulling a *former* property, and investing another with it: because gift is the assenting to vest a property in another, *thereby previously* annulling *a former* property; and sale is the same, but with the previous receipt of a consideration.

This opinion is contradicted, because it would be inconsistent with the text; "a gift or sale, thus made, must be considered as not made" (27). When a gift or sale subsists, though the assent was given by a stranger, how is it considered as not made? With reference to this question, authors write, that gift is a relinquishment producing the effect of vesting property in another, after annulling one's own property.

In the gift of another's goods, there is not such a relation between cause and effect as can produce a *real* gift: nor does the law express, that fruit is obtained by the gift or one's own property; for "his own" is not specified in the text, "who gives land, obtains land." It therefore follows, that "not made" (27) may be explained, similar to *a gift* or *sale* not made, inasmuch as it produces no fruit. Another exposition will be mentioned in the fifth book, On Inheritance. The conjunctive particle, in the text of CÁTYÁYANA (25), is employed to comprehend things not mentioned, namely, barter and the rest. Consequently the sense in effect is, 'by the assent of one who is not owner, another has neither right of property nor of possession.'

What is the rule if the land of a subject be sold by the king? Why does the king sell it? Does he sell it by an act of violence, or to recover an amercement or the like? In the first case, it is null (10): and, according to the opinion of those who hold that the king, and not the subject, has property in the soil, there is no sale in the case supposed; for there is no former owner but the king; and the king, selling the land, does not relinquish his own right: therefore, to give possession to another occupant, and to remove the former occupant after satisfying him, some consideration must be given: if he, being satisfied, accept it, in that case there is no dispute; but if he refuse it, possession given to one, of a thing already possessed by another, is invalid, like the hypothecation of a thing which was already pledged to another person.

28.

YÁJNYAWALCYA :—In all *other* contested matters, the latest act shall prevail; but, in the case of a pledge, a gift, or a sale, the prior contract has the greatest force.

It should not be argued, on the superior force of the earliest contract, as thus ordained by YÁJNYAWALCYA, that it may be true of pledges; but the superior force of the latest act should be affirmed in this case. The parity of this case and of the case of a pledge is reasonable; otherwise, why should not the king daily grant the same land to various subjects? Nor can this objection be reconciled to the law. This separate head of judicial procedure being adopted, because the delivery of land by the king to the subject is not included under the head of contests on boundaries, the law of pledges must be extended to it, by parity of reasoning. Or it may be answered, such a bad exposition should not be admitted. Every forcible act is void: but if force be not employed in this case, *the act is valid;* for every man has legal capacity for a gift or sale of his own property. But it would follow, according to the opinion mentioned, that the seeming sale of the subject's land by the king is valid: the subject therefore does not receive its price; it is received by the king *in his own right:* and in that case, an amercement is not recovered from the subject *by a sale of land;* and the king incurs a taint of sin. But, on the other opinion, a sale forcibly made by the king is void.

In the second case *(where land is sold to make good an amercement or the like)*, according to the opinion, wherein the king's sole property is maintained, the amercement is not recovered; as has been already mentioned. According to the other opinion, there is no *express* ordinance for the sale of land belonging to subjects who are missing, after the period for *the* recovery *of what is due from them* is passed; but the reason of the law *authorizes the sale,* since an amercement or the like could not otherwise be recovered: therefore the king should afterwards compel the owner to consent. But, if the owner be present, the sale should be made with his consent; or, if he withhold his consent, then other punishment is proper: but, since punishment cannot be inflicted on absent persons, it is fit their property should be sold. When the sale has been completed by the king, and the subject immediately attends, bringing the amount *due from him;* then indeed the sale made by the king is void, for the owner's property is not forfeited. The king cannot forcibly compel him to admit *the sale,* saying, "this property has been delivered by me to such a person; thou must therefore confirm the sale, for I will not accept the amount." But if the owner do not then attend, this sale *assumes* the form of a punishment for his offence. Else, inflicting other punishment, let the king release his property. Thus some *expound the law.* It is declared more fully under the title of Contests on Boundaries. To enlarge in this place would be superfluous.

It has been said, that the buyer shall receive back the price paid, and the owner shall recover his property: shall the owner repay the price?

29.

YÁJNYAWALCYA :—The *buyer* is justified by producing the seller: the owner recovers his property, the king receives a fine, and the buyer receives back the price from him by whom the thing was sold.

The text has been already expounded in the first book on Loans and Payment. (Book I, Chap. II, Sect. III, Art. III).

According to the opinion of ŚÚLAPÁNI, the buyer is justified by producing the seller; and the owner recovers, or obtains possession of, his own property. According to VÁCHESPATI BHATTÁCHÁRYA, he recovers the right of property. A thief having acquired a property by occupancy, the owner's property has been annulled, but is now revived under the authority of the text; "the owner recovers his property."

From whom does the king receive a fine? From the person subsequently mentioned, namely, him by whom the thing was sold; and the buyer receives back the price from the same. The property in the thing is revived, like property annulled by the semblance of a gift.

This text being placed under the title of Sale without Ownership, and the expression "the owner recovers his property," not being otherwise pertinent, the text must be understood as intending sale without ownership.

30.

VRÍHASPATI:—When the seller has been made to appear, and has been condemned in the law-suit, let the judge cause him to pay the price to the buyer and a fine to the king, and restore the property to its owner.

When he has been condemned in the law-suit, (when it is proved that he sold the thing, and was not the owner;) he shall be compelled to repay the price, &c., not upon a simple assertion.

Here, the payment of the price to the buyer being required, what price shall be paid; the price actually received, or the present value of the thing?

31.

NÁREDA:—In a case of sale without ownership, the seller must restore the thing to the owner, and pay to the purchaser the price for which it was sold, and a fine to the king, as directed by law.

This contradicts the childish supposition that the buyer is entitled to the thing, and the owner to the price only; for the sale is void. "The price for which it was sold;" the price agreed on at the time of the sale, and received by the seller. If any person steal and sell a cow, and afterwards the owner, seeing the cow, claim her; when the price is to be repaid to the buyer, that very price shall be recovered, though the value may have been diminished by the cow being worn by age: shall not the price be therefore recovered, even though the cow have died, if the purchase be proved by evidence; for the buyer has a right to the price, since it was a sale without ownership? It may be so: but this distinction, founded on the reason of the law, is justly inferred: if the cow become useless by age, still the real owner must receive that very cow, and the buyer receive the price he paid; but if the cow become useless, through the buyer's fault, from want of food, or from excess of labour, the buyer must receive less than the price, and the difference must be paid to the owner of the cow: it is not the seller's gain. If the cow have died by mere accident, the recovery of the price is the buyer's gain, and the owner shall not obtain a cow from the buyer; for his cow is lost to him, and the law does not show that any equivalent shall be given. This is pertinent on the opinion of ŚÚLAPÁNI.

But sale without ownership is established with difficulty on the opinion of those who assert that a thief has property in the thing stolen; for, *accord-*

ing to that opinion, a thief has ownership. It is thus *reconciled* : the thief's ownership ceasing when the cow is recognized by the real owner, it then becomes sale without ownership. If it be so, is not every sale a sale without ownership? for all sellers, by the act of selling, become non-owners; since perpetual ownership, *even after alienation*, is nowhere admitted. Nor should it be argued, that "owner" may be here understood in the triple sense of actual owner, of him who annuls that ownership by sale or the like, and of him who was not previously the owner; for property is annulled by a sale made even by a thief. To the question thus proposed, the answer is, No; for there is no difficulty in supposing an owner different from a thief to be positively intended by the word "owner," in the expression, sale without ownership, *or sale by one who is not the owner*. Of what use is this supposition? for the difficulty may be removed by not admitting the thief's ownership: and the objection is answered by asking, how can property arise without acquisition by an owner? The following text shows that property does vest in a thief:

32.

NÁREDA and the *Vishnu-dhermóttera* :—What is acquired by servile attendance, gaming, theft or the like, or by disguise, robbery, or fraud, all that is called property.

Former owner, *or possessor*, in a text which will be quoted from VRĬHASPATI (33), must have some meaning; but if thieves have not ownership, the word "former" would be unmeaning, since there would be nothing to which it could be opposed. Accordingly, if a person, having bought at a high price effects stolen, is dissatisfied *with his purchase*; and, after the period limited by law *for the rescission of purchase*, discovering that this sale, having been made by a stranger, is void, wishes to return the thing; it is not to be returned, even though the owner of the thing, who had not disposed of it, be dead. Such is the rule laid down by VÁCHESPATI BHATTÁCHÁRYA. According to his opinion, if a cow, which had been stolen and sold, die, it is lost to the buyer; for it is the loss of a thing possessed by him as property: therefore, in that case, he shall receive the price *from the seller*, on delivering an equivalent *to the former owner*; and, in the case of a thing stolen, the former owner receives an equivalent, under the authority of the law, if the original thing be lost.

But, according to the opinion of ŚÚLAPÁNI, property, in the text of NÁREDA (32), intends the power of disposing of the thing at pleasure; and the word "former" is employed in the text of VRĬHASPATI, in opposition to the thief and the buyer, who are secondary owners, inasmuch as they perform acts of ownership. It is a bad rule, in the case of effects stolen and sold, that a buyer, discovering the theft, and desiring to return the effects, may not return them. Thus a buyer discovering the theft, and desiring to restore the effects, but forbidden by the king or the arbitrators, keeps the effects and returns to his house; after some days the owner comes and claims the effects, and the thief, who had clandestinely sold them is dead; in this case the effects are the former owner's, and the buyer, though not in fault, would be a loser by restoring the effects without receiving the full price. He does not incur blame, wherefore he should lose half the price, as in the case even of a thing publickly bought; for, on discovering the theft, he was willing to return the effects.

Some hold, that there is no difficulty, if the producing of the seller (29) be explained discovering the theft of the seller, that is, making it

known to the king's officers, or to arbitrators or the like. Therefore, in this case, the buyer informing the king that the seller is a thief, may recover the price. No difference results from the two opinions; but, the text of NÁREDA being the sole ground for admitting *such* property, the practice, exhibited in explaining the opinion maintained by VÁCHESPATI BHATTÁCHÁRYA is bad. Is there not a difference in the result of these opinions; since, according to ŚÚLAPÁNI, it is not the buyer's loss, if the cow, which had been stolen and sold, die; for it is not the accidental loss of what was possessed by him as property; but, according to VÁCHESPATI BHATTÁCHÁRYA, it is the buyer's loss, for it is the loss of what was possessed by him as property? No; for, the sale being null, because it was a sale without ownership, it is fit, even on the opinion of VÁCHESPATI BHATTÁCHÁRYA, that the loss should fall on the thief. Consequently, the cow being dead, there is no present opportunity of investigating the property; but, the price not being lost by *the same* accident, the buyer has a right to it. According to the opinion of VÁCHESPATI BHATTÁCHÁRYA, if the price of the thing sold be fortuitously lost, and it afterwards appear to have been a sale without ownership, is it not improper to investigate the property, and require compensation, since the money is lost? Even according to the opinion of ŚÚLAPÁNI, is not the thief unaccountable, since it was lost, while it *yet* belonged to the buyer? and, in a similar case, if the cow be living, shall she not be received back by the thief, since the sale is void, being made without ownership? If a thing bailed to an artist, and not restored by him, be lost by accident, it is the owner's loss, for there is no fault in the artist; but if it be lost after the stipulated period *for repairing it, &c.*, it is the artist's loss, for his exceeding the stipulated time is a fault (Chap. I, v. 53). So the thief, committing a crime by selling the goods of another, must repay the price even though the goods be lost: but if they were bought with previous knowledge of the theft, the price of those goods, should they be lost by accident, is not to be repaid; for both are criminal. Even in the case of the death of a cow, which had been stolen and sold, the owner shall recover an equivalent from the thief; for he is criminal, as an artist who exceeds the stipulated time is faulty. If it be said, the thief is criminal in regard to the owner, because he may be thus accused, "wherefore has my cow been delivered to another?" But how is he criminal in regard to the buyer, to whom he delivered the cow; for he made a contract, receiving the price on the delivery of the thing? Even the buyer can arraign him. For example: "he is dishonest in having taken "my money, giving me another's property, which cannot long remain, and "which is *therefore* unfit for my intended uses: why did he not keep it at "home?"

This opinion should be received as the settled rule: the several opinions, previously noticed, were mentioned for the sake of illustration. To enlarge would be superfluous.

SECT. II.—*On the Production of the Seller, and Justification of the Buyer.*

33.

VRĬHASPATI:—When the former possessor shall come and prove his property in the thing bought, let the purchaser produce the seller; for thus may he clear himself.

The *Retnácara* explains "the former possessor," the person who was owner of the thing before the theft, or who had power to dispose of it at pleasure: "the principal" here signifies the seller. The legislator means the principal in the sale.

34.

YÁJNYAWALCYA:—He who has purchased *the* goods *of another,* which had been lost or stolen, must, *when accused by the owner,* cause the thief, *or other person who sold them,* to be apprehended: but if *circumstances of* time or place prevent *his apprehension,* the buyer must himself restore the goods.

He who has acquired, or obtained by purchase or the like, the goods of another lost and seized or stolen, being accused by the original owner, (this should be supplied in the text,) must cause the man who stole them, in other words the man who sold them, to be apprehended by the king's officers: he must cause him to be seized. But if he cannot cause him to be apprehended, being prevented by circumstances of "time or place," that is by the death or absconding of the seller, or the like; in that case, the buyer must himself restore the goods, when the owner's property in them is proved. Such is the exposition approved by CHANDÉSWARA. "Cause to be apprehended," is explained by some, show, *or point;* for the verb *grah,* take, is used in the sense of know.

The goods must be thus restored, without *receiving back* the price, if the purchase was privately made; but not so if the purchase was openly made.

35.

CÁTYÁYANA:—Either let a man make an open purchase *in an assembly of people,* or let him produce the seller; but let time be given him for the production of the seller, according to the number of *yójanas.*

2. Having offered to produce the seller, if he afterwards tender proof of a fair sale, let the judge require the production of the seller; there is no use of such proof *of a fair sale* by the defendant, *who first offered another justification.*

By proving an open purchase, or by producing the seller, let the buyer vindicate his innocence. CHANDÉSWARA.

Consequently the alternative of an open purchase and production of the seller denotes mutual opposition. It follows, that the same exemption from making good the effects himself, which the buyer obtains by producing the seller, is also *allowed* in the case of an open purchase. Let him prove his innocence, and therefore be exempt from penalties.

"An open purchase;" a purchase known to arbitrators and to the king's officers. "Let time be given him for the production *of the seller:*" if the seller reside in a distant country, he cannot be produced at the instant; let time be allowed for that purpose, and let the recovery of the thing be so long deferred, "according to the number of *yójanas:*" let so much time be given as is requisite to travel, going and returning so many *yójanas* as is the distance to the seller's residence.

"Having offered to produce the seller, &c." (35, 2): the buyer, when first accused, having said, "I will produce the man from whom I received the thing," afterwards says, "many persons know of my purchasing it;" in that case, his first and second plea differing, on which plea shall the decision rest? To that question the answer is this: "there is no use in his proving an open purchase;" that is, upon such proof he will not be held innocent: *let the judge* require the production of the seller. This interpretation agrees with the *Retnácara.*

It must be considered, that the text provides against dishonesty. Therefore, if the buyer, first undertaking to produce the seller, go to fetch him; but the seller happening to be dead, the buyer returns and says, "the seller is dead, but all the witnesses named know that the thing was bought from him;" in that case, if all the circumstances be proved, the decision must depend on the fairness of the sale; but otherwise, it depends on the production of the seller.

According to VÁCHESPATI MISRA, the text merely exhibits the natural inference. Thus, when the buyer says, "I bought this thing of DÉVADATTA, and all know the purchase and the commodity bought;" the seller must be apprehended, for thus may the sale be proved. But if the seller be not forthcoming, the justification of the purchase must depend on its publicity: and, according to this opinion, the necessity of proving a fair purchase surely follows in case of the seller's death, as abovementioned.

If the buyer first plead that the sale is publickly known, and afterwards offer to produce the seller, how is the law settled in this case? Since the text requires the production of the seller, when the sale is pleaded after offering to produce the seller, and since the circumstances of the case are here reversed, therefore proof of a fair sale should be required.

If it be argued, that the reason of the law shows the production of the seller to be requisite in all cases, for MISRA *says,* it is by producing the seller that a fair sale may be proved; but, according to the *Retnácara,* the first plea should be tried:—some reply, that the result of the different expositions of both authors is the same, and it should be so admitted: thus, if the sale be first pleaded, and the production of the seller be afterwards offered, both proofs should be received; for there is no ordinance for rejecting either proof, nor is it consistent with the reason of the law.

What shall be the decision if the defendant, failing in one proof, succeed in the other? The defendant, anyhow clearing himself from suspicion of theft, gains his cause; and this may be effected by either proof. By failure in which of them could his success be prevented, since both are severally declared by the law to be *admissible* proofs in justification of purchase?

What is the mode of proceeding, when a real thief, employing various methods to conceal the theft, advances several pleas at several times? In reply it is asked, how is the theft ascertained, unless he fail in the proofs required by the law? If it be said, this is inconsistent with the exposition of the text of CÁTYÁYANA according to the *Retnácara,* for proof of a fair purchase is in such case pronounced inadmissible; it is answered, the exposition of the text should be considered as supposing knavery; therefore, when knavery is observed, the cause must be tried on the first plea; but if no knavery appear, it may be tried upon any of the pleas: such is the true sense of the text according to the *Retnácara;* and the production of the seller and the proof of a fair sale are not exclusively intended by the text.

Here it should be noticed, that when the cause is tried, if the defendant be able to write, the judge should require all his pleas in writing, and a written declaration that he has no other plea: afterwards, should he offer another plea, he is evidently disposed to knavery. This we hold to be proper.

36.

MENU:—He who has received a chattel by purchase in open market, before a number of men, justly acquires the absolute property by having paid the price of it.

The place where things are sold *(vicriyanté)*, is the market *(vicraya)*: he who there buys a saleable commodity in the presence of persons transacting any business, thereby justly acquires the absolute property, justified by purchase from one who sells without ownership, because the seller receives the price from him. So CULLÚCABHATTA, who reads in the third measure of the verse, *visudd'ham hi* instead of *visudd'hah syát*. He makes it evident that the word *vicraya*, formed on a suffix denoting locality, signifies a market. He considers this text as bearing the same import with the text of MARÍCHI (55). "Received by purchase:" purchase *here* intends receipt of a thing for a price paid under the name of purchase.

It appears from this interpretation, that the buyer is not faultless if the purchase was made in any other place than an open market, and before credible persons, who are not officers employed by the king. But simple men thus interpret the text; "He who has received a chattel by sale, as the cause *of receipt*, before a number of respectable persons, is justified by the known open purchase, and legally acquires the property." The suffix of the word *visuddha* is in the neuter sense. But, reading *visuddhatwam* instead of *visuddham hi*, the sense is obvious. In the text (55), a place of trade is mentioned approximately; for sales and purchases can hardly be transacted anywhere but in a place of trade: and thence it is deduced, that a purchase secretly made, in a man's own house or the like, is defective. The word *cula*, signifying a number of persons of the same rank, in this text conveys a limitation: consequently men equal in rank, being respected persons, are meant. The term is explained by AMERA, genus, or multitude of similar beings. It is used by accurate speakers in the sense of near neighbours. According to this opinion, a purchase anywhere made before respectable persons, is an open purchase; and there is no fault in the buyer. Consequently the meaning is this: neither the defect of a private purchase grounded on the want of evidence, nor the suspicion of having purchased the chattel knowing it to have been stolen, exists in the case of a purchase made before respectable persons; and, if a purchase made after registering the name of the seller and of his ancestors to the third generation, and his place of abode, be faultless, and not otherwise, then it is proper that the purchase should be made in the presence of the king's officers; and, the king's officers being stationed for the *government of the* country at large, it is proper, for the purpose of avoiding much trouble, that the purchase be made in a place where many purchases and sales are transacted, namely, in a market. But no ordinance appears to prove this clearly. The difference between the two opinions should be fully examined by the wise.

CHANDÉSWARA reads, "he is justified by the purchase" *(sa visudd'has tu)*, and explains the text (36) "he who receives a chattel in open

market, before an assembly of respectable persons conducting judicial procedure, is legally justified by the purchase, and obtains the property *from the seller*." Consequently, according to his opinion, the rule does not direct the purchase to be made before the king's officers; for arbitrators, as well as officers employed by the king, conduct judicial procedure, since this term denotes the trial of causes: and the epithet of respectable would be superfluous, if king's officers were intended by CHANDÉSWARA in the expression "conducting judicial procedure;" for persons not respected are not appointed by the king to be his officers: their appointment would be useless, since such persons are not capable of conducting affairs. Neither is the superiority of king's officers, appointed for other business, above principal *Bráhmanas* and the like, consistent with the reason of the law; and the same sense is intended when persons conducting judicial procedure are mentioned, as when king's officers are specified.

Why not rely on the derivation of the word in the sense of locality? This objection is not proper; for derivatives in this form, from words of this class, are regularly used in another sense. But if that derivative sense be admitted, in the apprehension of the word being otherwise superfluous, sale is inferred from what follows. Consequently, market is mentioned as an instance only: if a purchase be made before principal persons, there is no distinction, whether it be in a market, or in any other open place; and, according to this opinion, the text must be supplied, "he is legally justified by *the fairness of* the purchase." But practice, in some places, justifies any sale made in the midst of the town and in the presence of respectable persons.

It must be considered that the king's officers are few, and respectable persons are surely numerous in every town. Consequently, if it be directed that every sale be made in the presence of those few persons, they become in a manner acquainted with the sellers by frequently seeing them: but if made in presence of many different persons, these, being only now and then present at sales, do not become acquainted with the persons of sellers: therefore it is proper that purchases be made before the king's officers. If the king, considering this, forbid sales to be otherwise made; then, considering the king's command as cogent, this form should be observed, without questioning whether it be, or be not, ordained by the law; and if the business of buying and selling be not obstructed by this formality, then also it should be observed. To expatiate would be superfluous.

37.

YÁJNYAWALCYA:—The owner shall recover his property sold by a stranger: blame is imputable to the man who buys not publickly; and he incurs the guilt of thief, if he buy from a very low man, in a secret place, at a very cheap rate, and at an improper time.

If the purchase be clandestine, blame is imputable to the buyer: such is the construction. "If he buy from a very low man," &c., is a distinct phrase. CHANDÉSWARA thus comments on the text; "from a very low man," not likely to be the owner of that chattel; "at an improper time," not at the proper hours of sale. Consequently he who buys from a very low man, clandestinely, at a very cheap rate, disregarding *proper* time, is a thief: such is the sense of the phrase.

Is a purchase made under any one of those circumstances punishable as a theft, or a purchase made under all those circumstances? Not the first; for "in a secret place" would be superfluous, since the same results also from the preceding phrase; and even a purchase made before the king, at an improper hour, would be criminal. Not the latter; for a purchase made at a proper time, even though at a very cheap rate, from a very low man, and in a secret place, would be faultless. To the question thus proposed the answer is, this half of the text shows defects incident to purchase though proved; therefore each of the circumstances mentioned are causes of defect. "In a secret place, at an improper time," are distinguished: therefore a purchase made in the middle of the night, even in presence of the king's officers, is defective; for even those officers are not respectable, consenting to the sale of effects which they know to have been stolen. A secret purchase is therefore separately mentioned to denote such a distinction.

It must be considered, that there is no offence, if it be fully ascertained by five respectable persons, that the thing was given to this low man by some considerable person; and if urgent necessity be fully proved, there is no offence in a voluntary sale, even at a very low price; nor is there any offence on the part of the buyer, even though the purchase be made in the middle of the night, if the thing was thus sold from apprehension of the seller's kinsmen, but in the presence of honest and respectable persons; and even in the case of a purchase privately made, if the seller acknowledge the sale and the buyer's innocent intention, there is no offence. The king, from his own judgment, should apply to each case what agrees with the reason of the law; for, "if no decision were made according to the reason of the law, there might be a failure of justice."

38.

NÁREDA:—He who buys anything from a slave without authority from his master, from a man not of a good character, in private, at a very low price, and at an unfit hour, becomes an accomplice of the man who stole it.

If a slave intrusted with a chattel for transport or custody, having it in his power, sell it, he is a thief; and so is the buyer also: but if the owner authorize the sale, there is no offence. It must be considered, that, on whatever occasions (for the support of the family or the like) a debt contracted by a slave would be payable by his master, the sale of his master's property, for the same purposes, is valid. The expression "without authority from his master," intends a case not attended with such circumstances: and the same sense should be ascribed to the text of MENU; "*A contract made by a person without authority is utterly null*" (11).

"Slave" is here employed in the general sense of any dependent person: therefore a purchase made from a son or the like, is defective; but if a man buy with the knowledge of the owner's having authorized the sale, there is no offence.

39.

CÁTYÁYANA:—The defendant, not clearly proving an open sale to him, or not pointing out the seller, shall be made to deliver the thing claimed and to pay a fine.

Justification of the purchase consists in the proof of *an open* sale. He shall be made to pay a fine, as a thief. In this case, the buyer is not justified: MENU propounds the fine which the king receives, as declared in the text of YÁJNYAWALCYA (29).

40.

MENU:—If indeed he be a near kinsman of the owner, he shall be fined six hundred *panás;* but if he be neither his kinsman, nor a claimant under him, he commits an offence equal to larceny.

"Shall be fined" (*avahárya*), shall be amerced. "A near kinsman of *the owner* himself" (*swánwaya*); a son or other *near* relation of the owner, "Six hundred;" *panás* must be understood. "Not his kinsman;" not related to the owner. "Not a claimant under him" (*anapasara*); not having taken it *by authority of a kinsman:* the taking of it is the removal (*apasara*) of it from the house of the owner. Hence, he who sells the property of another, being related to him, shall be fined six hundred *panás:* but if that seller be neither related to the owner, nor become, through a kinsman of the owner, receiver of that chattel taken from the house of the owner, but himself be the taker of it, he shall be punished as a thief: if the embezzlement of the chattel be the act of another, and the seller be unallied to the owner, he shall be fined even in a larger sum than six hundred *panás.*

The *Retnácara.*

"A fine;" an amercement of six hundred *panás.* He shall be fined; a fine shall be levied (*avahárya*) on him. The etymology of the term *swánwaya* is, 'he in whom there is a relation (*anwaya*) with *the owner* himself (*swa*);' that is, a son, and so forth, including brothers and the rest; for it is so declared by CULLÚCABHATTA. A seller, into whose hands the chattel had not been removed or transferred from the house *of the owner* by another who is kinsman of the owner; such a seller, *we say,* not being related to the owner, commits an offence equal to larceny. If the sale of a chattel transferred into his hands by a son or other kinsman of the owner, be made by one not related to the owner, he shall be punished in another mode: on this a question arises, to satisfy which the commentator adds, 'if the embezzlement be the act of another, and the seller be unallied *to the owner* (for the sign of the privative "a" must be understood), he shall be fined even in a larger sum than six hundred *panás.*' By the particle 'even' it is intimated, that a larger fine than six hundred panás is founded on the reason of the law. According to this opinion, the rule concerning a sale without ownership, by one unallied to the owner, is two-fold.

But the author of the *Calpateru* says, that by which a thing departs (*apasarati*) or *is transferred,* is a claim or title (*apasara*), as acceptance and so forth: he who has not such a claim or title, is not a claimant under the owner. If the property of another be sold, without acceptance of donation or other claim under him, by one not related to him, the seller shall be punished as a thief.

And this interpretation is approved by BHÁGURI, the *Méd'hátit'hi,* and the rest. MISRA also fully approves it; and according to this opinion, the rule concerning sale without ownership, by one unallied to the owner, is single, and there is no distinction of embezzlement, or no embezzlement by a kinsman: however, the term "claimant under him," becomes superfluous according to this interpretation; for if a man sell property obtained by

acceptance of donation or the like, it is not sale without ownership, since the effects had become his property by the acceptance of donation. Considering this objection, the author of the *Retnácara* has approved another interpretation. CULLÚCABHATTA expounds the word *apasara*, acceptance, purchase or the like: he to whom no such title has been given by the son or other near kinsman of the owner, is not a claimant under him *(anapasara)*. Consequently, he has nearly followed the opinion of the *Retnácara*. When the son or near kinsman of the owner is giver or seller, there is a ground of claim: even on the opinion of the author of the *Calpateru* and the rest, this interpretation may be adopted; for, in answer to the question from whom accepted, the owner must not be assumed, but his son or near kinsman, else the term *(anapasara)* would be unmeaning; and if a term can become pertinent, it should not be considered as a superfluous term, expressive of what is naturally inferred. Consequently, the opinions of all authors coincide.

The son, or other kinsman, who had given or sold the thing to the person who sells it again without ownership, shall be amerced; for he causes the sale without ownership to be made. Or this is intimated by the author of the *Retnácara*, 'if the embezzlement be the act of another, &c.' for, if a thing obtained by purchase from a kinsman who embezzled it be sold, the kinsman, who first sold it to the *last* vender shall be fined six hundred *panás*; and it appears from the particle "even" or "also," that the seller, who had purchased it from a kinsman, shall be amerced.

It must be considered, that if a son or other kinsman, secreting any property, sell it through an intermediate person, the seller shall not be punished as a thief, but shall be amerced in six hundred *panás*, or the like: and the intermediate person, being in fact a substitute only, shall not incur the punishment of a sale without ownership, but receive severe reproof or other reprehension suitable to such improper conduct; but the man who sold the thing through an intermediate person, incurs the amercement mentioned.

41.

MENU:—By this rule shall that man be punished who ignorantly makes a sale without ownership; but if he knowingly do so, he is liable to the punishment of larceny.

Attributed by CHANDÉSWARA to MENU, but inserted by MISRA after the texts of MENU, premising the word "so." Is it not inconsistent with the following text, which, declaring innocent the sale of another's property inadvertantly made, shows that there shall be no punishment?

42.

Matsya Purána:—That man who ignorantly sells the goods of another is free from offence; but if he knowingly do so, he is liable to the punishment of larceny.

CHANDÉSWARA explains free from offence, exempt from capital punishment, not exempt from amercement.

What is the meaning of the terms "by this rule" (40)? MISRA replies: he who ignorantly sells the property of another, shall be punished with an amercement of six hundred *panás*; but he who knowingly sells another's property, shall be punished as a thief, by mutilation and the like.

Shall the man who inadvertently sells the property of another be fined sixhundred *panás*, whether he be a kinsman of the owner or not? Some hold that a kinsman of the owner, who ignorantly sells property not his own, shall be fined six hundred *panás;* but knowingly selling it, he shall be punished as a thief: and if, not being a kinsman, a man ignorantly sell the property of another, he shall be punished as a thief; but if he wittingly sell it, the law knowing no greater punishment, he shall, in that case also, be punished as a thief: and the meaning of the text is, "by this rule, *that is,* "by a pecuniary fine of six hundred *panás*, and by the punishment of larce-"ny, shall the kinsman and stranger respectively be punished, if they ig-"norantly sell the goods of another; but whoever knowingly sells the goods "of another, whether a kinsman or no kinsman, shall be punished as a thief:" and the text of the *Matsya Purána* relates to kinsmen; for a stranger is in all cases punished as a thief.

Others say the pronoun "this," in the expression "by this rule," referring to the subject of thought, intends a fine of six hundred *panás;* and the meaning is, that a stranger, inadvertantly selling the goods of another, shall be fined six hundred *panás;* and the expression "he commits an offence equal to larceny," supposes the wilful sale of another's property: but a kinsman, whether ignorantly or knowingly selling the goods of another, shall be fined six hundred *panás*, for the law has not shown a less punishment. It cannot be objected, that there is no argument whereon to establish such a bad construction; for, or any other construction, the punishment would be disproportionate. Thus the very punishment which is due when a man seizes a thing in the night and so forth, knowing it to be the property of another, would be incurred by one who, keeping a deposit to oblige the owner, (and the chattel being placed with his own goods, and being similar in quantity,) sells that chattel which belongs to another. This would be highly inconsistent with common sense; and the text of the *Matsya Purána* expressly declares, that there is no offence. If it be said that text should be otherwise explained, they answer, can a capital punishment be proper in a case in which it is declared; in general terms, that there is no offence?

Others again say, the *Matsya Purána* declares innocent the holder of a deposit or the like intrusted to him by the owner himself; but the punishment of a man who, finding another's chattel dropped on the road, sells it, thinking it his own, is mentioned by MENU: and this should be expounded in conformity with the opinion of others, because the seizure of a chattel dropped on the road is as it were a theft.

The best of these opinions should be selected by the wise; but one opinion only should be adopted. In such detail has punishment been mentioned for the case of a sale without ownership; and that punishment is only inflicted when the owner has proved his property.

43.

CÁTYÁYANA:—The owner of a thing, which he loses, *and then finds,* shall recover it, if he prove by credible witnesses that it was his own, and that he never gave, sold, or otherwise aliened it.

"By credible witnesses;" by competent evidence. The word "abandoned" denotes sale, gift, or any other act annulling property,

The *Retnácara.*

Consequently "abandoned" (the term used in the text) does not merely intend "neglected," for in this place it may indicate any act annulling one's own property, and comprehend gift, sale or the like: gift and sale are repeated in like manner as one name of kine may denote cattle of that sort, and a synonymous term in the same sentence may intend cows only: therefore "abandoned," (or aliened,) denotes also gain, conquest, and acceptance.

The person who had lost the thing shall recover it on showing that it is in fact his own, by proving that he neither gave, sold, nor otherwise aliened it. Or he shall recover it on proving that it was his own, and that he never gave, sold, or otherwise aliened it. Consequently the order of procedure is this: first, on seeing his chattel in the possession of any person, he has claimed it, and the buyer has produced the seller; next, in a contest with the seller, let the owner prove his property, by showing that the thing was his own, and that he never aliened it. Let not the buyer contest the property, for VYÁSA directs that "the law-suit shall be continued between the owner of the thing lost and the seller" (49): but if the seller be not forthcoming, the suit must be defended by the purchaser; as will be mentioned in another place.

44.

CÁTYÁYANA:—But if such claimant prove not the thing to be his own by credible witnesses, he should be punished as a thief, for the sake of deterring *others* from making false claims.

"Credible witnesses;" mentioned approximately. Proof in general is meant. The *Retnácara* notices another reading, "if he prove it not by kinsman;" which is explained as mentioned incidentally, intending proof in general: some, it says, read, 'if he prove it not by credible witnesses;' and the same meaning should be inferred. That is, credible witnesses indicate proof in general: the word (which literally signifies making known) does not merely intend witnesses making known *the fact*; but, taken in a secondary sense, with and without its primary sense, intends possession and other proof: for the purport is the same as in the text which will be quoted from YÁJNYAWALCYA (45).

"For the sake of deterring, &c." to prevent repeated claims. Thus, being punished to prevent a repetition of the offence, he may not repeatedly prefer false claims: and, the claim itself being criminal, as often as he makes a claim, the truth of which he cannot establish, so often shall he be punished; since punishment for each claim is proper, as it is for repeated theft. Thus some expound the text.

45.

YÁJNYAWALCYA:—The right to a thing lost *and then found*, must be proved by the mode of acquisition, or by *evidence of* possession; otherwise, on failure of proof, a fine equal to a fifth part *of its value shall be paid* to the king.

Let the owner of a thing which has been lost, and is found, prove his property by the mode of acquisition, (by purchase or the like,) or by *evidence of* actual enjoyment; otherwise, on failure of this and other proof, (that is, the property not being proved,) a fine equal to a fifth part must be

paid to the king: this construction agrees with the gloss of the *Retnácara*. The written contract of sale is evidence of a purchase, and so in other cases; but actual enjoyment, even without proving a purchase or the like, is presumptive evidence of property.

46.

VRIHASPATI:—The covetous man, who, without any right, claims the property of another, on failing in his proof, shall be compelled to pay a fine *equal* to double *the value of the thing claimed.*

This payment of a fine equal to double the value, supposes a claim covetously made, knowing the thing to be the property of another; but a fine equal to a fifth part of the value, as mentioned by YÁJNYAWALCYA, supposes a claim made by mistake: there is no contradiction.

The *Retnácara.*

What is the import of the words of CÁTYÁYANA, "he should be punished as a thief" (44)? Some hold, that this repeats the punishment of theft. Thus, when a fine equal to double the value is mentioned, reference must be had to the text of VYÁSA.

VYÁSA:—The man who steals hollow canes, flowers, roots of fruit, shall be compelled to pay a fine equal to double their value, or an amercement of five *crishnalas.*

"Hollow substances;" canes and the like. The word *crishnala* intends a quantity weighing a barley corn. So the *Retnácara*, in the Chapter on Theft. The terms of the text of YÁJNYAWALCYA intend five times the value; consequently, when a fine equal to five times the value is mentioned, reference must be had to the text of NÁREDA.

NÁREDA:—For *stealing vessels* made of wood, grass, or earth, bamboos and vessels made of bamboos, tendons, bones, or leather;

2. Pot-herbs, esculent roots, fruits or flowers, milk or the like, or the produce of the sugarcane, salt, or oil;

3. Victuals cooked, or *anything* prepared for food, wine, boiled rice, or any cheap article; the fine is five times the value of the thing stolen.

And so, for other things, the amercement must be understood to be the same with the fine in cases of theft. But this is not satisfactory, for it disagrees with the *Retnácara.*

Others explain the text (45) differently. Let the owner of a thing lost prove his property by the mode of acquisition, or by evidence of prior occupancy. Therefore, if it be proved in another mode (that is by witnesses), or if it be not proved, a fine equal to a sixth part of the value shall be paid. Another case, *they say*, is mentioned by VYÁSA.

47.

VYÁSA:—If the plaintiff prove not his loss by witnesses, he shall *in that case* be compelled to pay double its value; and the purchaser is entitled to the thing.

They expound this text, "Let him not prove his loss by witnesses, &c." Let him prove his property in the thing which has passed from the right owner to another person; he should not prove his right by witnesses, but by other proof, as mentioned by YÁJNYAWALCYA. If he cannot prove his right in the mode ordained by YÁJNYAWALCYA, what is the consequence? The text declares, "he shall be compelled to pay, &c." and the purchaser is entitled to the thing; that is, the claimant loses the cause. But if he cannot bring witnesses, CÁTYÁYANA directs that he shall be punished as a thief (44). It should not be objected, that, if the right owner be unable to prove his property by the mode of acquisition, why should he bring witnesses? Witnesses should be brought for the purpose of obtaining a mitigation of the fine: the king should take evidence to decide according to the honest disposition of the party. Thus the exposition given in the *Retnácara*, to reconcile the texts, in apposite: the text of YÁJNYAWALCYA (45) is applicable to the case of a claim made by mistake; and the text of VYÁSA and VRĬHASPATI, to a claim made from a motive of avarice.

That is totally wrong. If witnesses be not adequate proof, how should the fine be mitigated, under those texts? If they be adequate proof, why should not the party be exempted from a fine, under those texts? And it contradicts the text of CÁTYÁYANA (44), which shows that the owner shall recover a thing lost and then found, if he prove by credible witnesses that it was his own, and that he never gave, sold, or otherwise aliened it. The true interpretation of the law is this: he who cannot prove his right incurs punishment, because his offence is similar to larceny (40 and 44). Consequently he shall be punished as a thief (even though he have not actually taken the goods of another) if he make the attempt; for punishment is mentioned generally by CÁTYÁYANA. A distinction is declared by YÁJNYAWALCYA and VRĬHASPATI (45 and 46), according to the different motives of the claim, mistake or avarice. The text of VYÁSA (47) must be supplied with the words *if* and *in that case*: "if the plaintiff cannot prove his right by credible witnesses, he shall in that case be compelled to pay a fine equal to double the value of the thing claimed:" and this text, which relates to the case of a law-suit between the owner of a thing lost and the buyer, may, from parity of reasoning, be applied to a law-suit between the owner of the thing lost and the thief; therefore, in such a case, the supposed thief obtains the thing.

When the buyer cannot produce the seller, nor prove a fair purchase, he shall pay an amercement, as directed by the following text:—

48.

CÁTYÁYANA:—The claimant should first prove his property by oral evidence; next, to clear himself, the buyer should prove a fair purchase by credible witnesses:

2. If he cannot produce the seller, let him even justify the purchase; and if the purchase be justified, he shall in no wise be blamed by the king.

3. Let him prove a publick purchase by honest and credible witnesses: there is no other mode propounded, divine or human.*

* The text cited at v. 39, is again quoted in this place.

The order of proceeding should be nearly such. A man finding a thing in the possession of some person, claims it as his own; and the possessor alleges that he purchased it: in that case, if he can point out the seller, and the seller acknowledge the sale, the suit must be maintained against the seller, as abovementioned. But if he cannot point out the seller, then the claimant must prove his property by sufficient oral evidence; and the buyer must afterwards justify the purchase by credible witnesses, that is, he must prove the actual purchase. The buyer has a right to prove a fair purchase, if he cannot point out the seller; but if he point out the seller, he cannot afterwards offer proof of a fair purchase (35, 2). As this justification is of less force, the text proceeds, "if he cannot produce the seller, let him even justify the purchase" (48, 2): the word "even" shows a distinct order of proceeding; if he cannot produce the seller, (if he cannot cause him to be apprehended,) let him justify the purchase, or let him prove his purchase by credible witnesses. But if the seller, attending, do not acknowledge the sale, let the buyer compel an acknowledgement by the evidence of his own witnesses, who knew of his purchase; and this only is a true production of the seller: it is not sufficient that he merely point out the person of the seller.

Is not this inconsistent with the text of Vyása?

49.

Vyása:—But if the seller be produced, the purchaser shall by no means be condemned; for then the law-suit must be continued between the owner of the thing lost and the seller.

It is not inconsistent; for this is proper, since the word 'law-suit' here denotes the suit promoted by the original owner of the thing to obtain his property. When a man claims a thing which has been purchased by any person, why should the buyer unnecessarily take the trouble of producing the seller? But when the owner proves his property by witnesses or otherwise, that trouble must be taken.

50.

Menu:—But if the vender be not producible, and the vendee prove the publick sale, the latter must be dismissed by the king without punishment; and the former owner, who lost the chattel, may take it back, *on paying the vendee half its value.*

If the vender, being dead, or having gone to another country, cannot be apprehended, and the vendee prove the publick sale, he is not liable to punishment; he must be dismissed by the king; and the owner of the thing sold without ownership shall receive the chattel from the buyer.

Cullúcabhatta.

A distinction will be mentioned in respect of what shall be recovered.

Declaring the mode of justification, Cátyáyana says, "let him prove a publick purchase, &c." thus clearly excluding justification by any other mode; "there is no other mode," &c. Ordeal is not sufficient proof; but the sale must be proved by human testimony. Or the sense may be, "no other proof, divine or human, shall be admitted, except the evidence of witnesses." In the absence of the vender, a paper in the vender's own hand-

writing is no evidence, without witnesses. Is adverse possession for the space of twenty years, or the like, inadmissible proof? Say not, "be it so;" for that would be inconsistent with common sense. To this some reply, that the evidence of witnesses, as the mode of proof required from the owner of a thing lost, is only mentioned illustratively by YÁJNYAWALCYA; as proof by kinsmen, in the text of CÁTYÁYANA, also denotes generally proof of a title or of previous possession. It cannot be objected that a written document would be proof of right; for that is not admissible evidence in such a case. Neither can it be objected that there is a distinction in the exposition given in the *Retnácara, on the text of* CÁTYÁYANA (44); for that is otherwise explained by the same author.

But the author of the *Retnácara*, expounding kinsmen as intending proof in general, says, 'if kinsmen, that is, witnesses, cannot be produced, other evidence may be brought.' It must be considered, that if ordeal be admissible proof, the mention of it is superfluous, since it would be comprehended in the general sense of the expression used in the text of CÁTYÁYANA. It cannot be objected, that it is only mentioned for the sake of the order *in which different proofs are admissible;* for ordeal is directed on failure of other proofs.

Proof is declared to be by writing, by possession, or by witnesses: on failure of these several proofs, one of the several ordeals is ordained.

Human testimony cannot be postponed to ordeal; it would be contrary to common sense. Thus, some person having received the stolen property of another, and afterwards the true owner seeing it, the possessor pleads the purchase, and, to prove it, offers a document in the seller's own handwriting; in that case, it would become sufficient proof. In causes concerning loans and the like, the document must be verified by comparison with another document in the same handwriting: but here, without reference to the vender, a written document cannot be given in evidence; yet the writing of a person residing at a distance would, when collated with another document in his handwriting, become evidence after the death of the writer. Nor can it be said that there is no difficulty in admitting a written document to be sufficient proof of property on the part of the owner of a thing lost, since the sale regards him; and the evidence on both sides being equal, the proof fails. A document in the handwriting of a vender who resided in a distant country, is no evidence; but if his residence be near, even his sons, acknowledging the sale made by their father, become witnesses. The word "there" shows, that secondary evidence, in neglect of the best evidence, is not admissible. It would contradict the legislator's own words: thus, if the word kinsmen be used for proof in general, "there" also refers to proof. The meaning is, that if there be possible evidence, another mode of proof (that is, proof by ordeal,) shall not be admitted. What follows from the rule, that proof by ordeal is not admissible if there be evidence, must be well examined. Thus some interpret the law.

VRĬHASPATI:—Poison is the ordeal ordained where a thousand *pieces* have been stolen; fire, where *the theft is* a fourth less, *or seven hundred and fifty pieces;* water, where *it is* three-fourths less, *or two hundred and fifty pieces;* and the balance, where half, *or five hundred pieces have been stolen.*

Ordeal being thus directed in case of an accusation of theft, and this being, in its effect, similar to a charge of theft; therefore the opinion of CHANDÉSWARA is right. "There," &c. (47, 2), refers to witness, explained in the *Retnácara* evidence in general. As for what has been said, that if a man, alleging a written document in the seller's own handwriting, exhibit a document subscribed by a person whose residence is in a distant country, then, a writing being no evidence, proof must be required; all that is futile, for it becomes evidence when the handwriting of the seller is proved; and here, if the handwriting be doubted, proof may be required: and if it be wished to prove the handwriting by comparison with another document, even in that case the writing may be proved. This again is nothing to the purpose.

When neither party can adduce evidence, what shall be the decision? and when the buyer cannot justify the purchase by evidence, but the plaintiff proves his property, what shall be done? The law declares it, "the defendant not clearly proving, &c." (39). If the plaintiff say, "this metallick vessel contained a thousand pieces of silver belonging to me, restore me the vessel with the money," the vessel and the money must be restored, if the defendant cannot perform ordeal; but if he can disprove the money by ordeal or otherwise, the vessel only shall be restored. Thus some expound the law. But this is futile; for it is inconsistent with the practice of great persons. An exposition established in one case is applicable to another, unless there be *a sufficient* objection: under this maxim, the very rule delivered under the title of Loans and Payment (Book I, v. 199) is proper in this case.

From this text, delivered under the title of Loans and Payment, it appears, that, much being claimed by the creditor from the debtor, so much only as is proved shall be recovered: and the same is proper even in this case. The expression being general, if it be received as applicable to the whole claim, then an unproved claim is surely null. It should not be objected, that the text is limited to the title of Loans and Payment by the use of the term *dhanì* (which commonly signifies creditor); for its literal meaning of owner is pertinent.

51.

NÁREDA:—Let not the purchaser conceal the man from whom he purchased; on that man depends his own justification: if he act otherwise, his crime is held equal, and he shall suffer the same punishment.

If he act otherwise, if he conceal the vender, his crime is equal to the crime of the vender, and he shall suffer the same punishment: *that is, the punishment of larceny, to which the vender would have been liable.*

The *Retnácara.*

If the buyer be a near kinsman of the owner, shall the penalty be an amercement of six hundred *panás*, as directed for sale without ownership by a kinsman (40); or shall he be punished as a thief? It is said, suspicion of theft being removed, if the vender be proved, although his person be concealed, there is no difficulty in saying, that the penalty for concealing his person shall fix hundred *panás*; but if the vender be not proved, the buyer appears to be the real thief, and shall be punished as such, even though he be a near kinsman. That, however, is not indicated by this text; but, a

fine or *punishment* being directed by the text of CÁTYÁYANA (38), it appears that he shall be punished as a thief, because his crime is equal to larceny.

What is the concealment of the vender? If it consist in not particularly mentioning that the thing was purchased through that person; why should the buyer do so? When he dishonestly buys the property of his kinsman, from a stranger, at a low price, having been requested by the seller not to make known that it was sold by him; the buyer might in that case conceal the man from whom he purchased, through fear of forfeiting his friendship, or from some other motive. Or the word may be explained "the written contract;" and the sense may be, "let not the purchaser conceal the contract, &c.," and the motive for concealing it may be the apprehension of making known the very low price at which the thing was bought.

How is it known that the contract is concealed? It is not ascertained by the mere omission of producing it, whereby a failure in justifying the purchase would imply wilful concealment: nor does it appear from the text of NÁREDA (51), that the punishment *of larceny* is ordained for a simple failure in justifying the purchase; were it so, the offence would be equal whenever the purchase was not justified; but, this not being declared, the expression, "let not the purchaser conceal, &c.," cannot be so applied. To this it is answered, if the buyer in the first instance produce the contract, and afterwards, defending the suit before other arbitrators, conceal it, in this and other cases concealment is ascertained. In this case, if the purchase be proved, the purchaser, being a near kinsman, shall not be punished as a thief, but be fined six hundred *panás* for his offence in concealing the contract.

But, if the owner have no proof of his property; nor the buyer, of his purchase; the claimant loses the cause: for the purchase is *not* to be justified, *until* after the claimant has proved his property.

52.

VRĬHASPATI:—In a suit where proof is deficient, the king must himself decide according to the equal, greater, or less credibility of the parties.

Employing spies in the manner mentioned under the title of Bailments, and thus ascertaining the equal, greater, or less honesty or dishonesty of the parties, the king must himself decide the suit. The *Retnácara.*

The meaning is this: when a buyer, sued by the owner, has produced the seller; and, the suit being continued against the seller, both parties assert their own property in the thing, but neither have sufficient proof; in such a case this text is to be followed. The decision where both parties are equally credible, will be mentioned: if one party be less credible, he loses the cause, and the person whose credibility is greater gains it.

It is the business of a spy, assuming the appearance of a thief, or some *other* disguise, *such as that* of one employed in the service of a petty prince, to insinuate himself into the friendship of the man, and detect his conversation and conduct with his relatives. Sometimes the spy says, "to-day let us carry to a distant place, and sell this chattel which has been privately obtained;" and according to his answer his conduct is to be presumed. Wise kings, or their officers, may themselves adopt other modes.

According to this opinion, if neither party can adduce proof, their general conduct should be examined; and thus may the suit be decided: in other cases the general conduct even of witnesses should be examined; otherwise the king would be unjust, and the loss would be equally borne by both parties whenever proof is deficient. This should be examined by the wise.

But MISRA holds, that if the purchase was publickly made, and the buyer cannot produce the vender, his place of abode being unknown, the buyer shall not be fined; for he is not criminal. Who then shall have the thing? Shall the owner have it, because his property is not annulled? or shall it remain in the buyer's possession until he receive the price? VRĬHASPATI says, in a suit where proof is deficient, if it be pleaded that there are not means of ascertaining the vender's place of abode; (if the buyer say, "I know not where the seller is;") the king must decide according to the equal, greater, or less credibility of the parties: the loss must necessarily be borne by both parties, according to their respective characters.

What decision shall be given? The same legislator propounds it:

53.

VRĬHASPATI:—If a purchase be made before a publick assembly *of traders*, with the knowledge of the king's officers, but from a seller whose dwelling-place is unknown; (for if a claim be made after the death of the seller, *though known*;)

2. The owner of the thing may recover his own property, on paying half the price given; half the value is loss to each of them: such must be the decision.

"Before a publick assembly of traders;" meaning generally a market or the like. "With the knowledge of the king's officers;" officers appointed by the king for that purpose: this also is a general expression. "From a seller whose abode is unknown;" from one whose dwelling is not well known. So the *Retnácara*.

In the case of a private purchase, the buyer must restore the thing to the owner without receiving back the price, as already mentioned.

How can the buyer be entitled to half the price, according to the opinion of ŚÚLAPÁNI; since the owner's property in effects stolen is not annulled, and the owner has not received the price? But, according to the opinion of VÁCHESPATI BHATTÁCHÁRYA, the buyer receives no part of the price, since the sale is null, as a sale without ownership, although the thief's property in the thing have been transferred; or he is entitled to the whole price, because he has property in the thing.

54.

VRĬHASPATI:—A purchase from an unknown seller is one fault; negligence in keeping the thing is another: and these two faults are to be considered as just causes of loss to each.

By mentioning that both are in fault, it is meant that equal loss is the punishment of both faults. Thus, according to ŚÚLAPÁNI, although the owner's property in the thing was not annulled, he pays half the price, on account of his fault in neglecting the custody of the thing; and the buyer

loses half the price, on account of the slight offence of buying from an unknown vender.

According to this opinion, is not the half price received back by the buyer an excessive advantage? He does not receive half what remains above the loss; for the thief, not the owner, received the price from him: consequently the loss of the chattel received from the thief is the actual loss; and what the buyer receives from the owner becomes his gain, since the owner had no concern in the sale: what is given by the owner, ought therefore to be taken by the king as a fine. To this it is answered, since it is not fit that the king should receive the fine for the fault of neglecting the custody of the thing; and since the payment of it is necessary under this text; and since it is also necessary that the buyer should receive it from some person; the king shall cause it to be paid to him. "The king should himself decide, &c." (52). Therefore, although it might not accord with general reasoning, the buyer shall receive half the price with the approbation of a king who governs according to law. According to the opinion of VÁCHESPATI BHATTÁCHÁRYA, there is no difficulty: the full property is revived, where the seller is known, by the mere production of the seller: but in this case, full property is revived after paying half the price; and the buyer is not entitled to receive the whole price, because there has been a fault on his part.

55.

MARÍCHI:—If a purchase be made by day before a publick assembly of traders, with the knowledge of the king's officers, the purchaser is justified, and acquires the absolute property.

2. But if he cannot produce the seller, his dwelling-place being unknown, the loss shall be borne equally by the buyer, and by the *former* owner who had lost the thing.

"His dwelling-place being unknown," or it being uncertain whether he be alive or dead: the expression is general. If the property be not proved, what shall be the decision in the suit between the owner and the thief? The same; for both are equally in fault: and the *Retnácara* so expounds the text.

56.

VISHNU:—There is no crime in him who ignorantly buys *from a stranger* the goods of another: but the owner shall recover his property.

On paying half its price must be supplied in this rule: thus it does not relate to private purchases; if it did, it would be improper to say that a buyer should be acquitted without proof of a fair sale, though suspected of theft: but, referring the rule to an open purchase, it coincides with the text VRĬHASPATI (53), and fitly shows that the property shall be recovered on paying half the price. It cannot be said that no fine is incurred if a sale privately made be anyhow proved; but the owner shall recover his property without paying any part of the price: and in the case of a fair sale, the proper decision is that which is mentioned by VRĬHASPATI (53). A sale proved, partakes of the nature of a fair sale.

MISRA says, some purchases, though made from the owner himself, are questionable: and the rule of decision is the same as in Sale without ownership.

57.

VRĬHASPATI :—There is no fault in the man who purchases a thing at a fair price, delivered by the owner in *the* presence *of credible persons;* but a fraudulent purchaser is a thief:

2. A fraudulent purchase is declared to be that which is made at a very low price, in a private apartment, in a place out of the town, by night, in a situation where the bargain cannot be overheard, or from a man not known to be honest.

Delivery by the owner in the presence of credible persons: the text must be so supplied. By the subsequent phrase, "a fraudulent purchaser is a thief," which is expounded, purchasing in the recesses of a house, it must be understood, that a fair purchase is made in a place fit for such transactions: a very low price being mentioned in the subsequent verse, "price" in the first verse signifies a fair price. Accordingly, if a man buy a thing at a very low price, even from the owner himself, whom he has brought to his own house in the night, and whom he has deceived, he is criminal, and shall be punished as a thief. But there is no offence in a sale voluntarily made, at a low price, by an indigent man, with the approbation of great persons: and such is the practice.

What is the rule concerning traders who give a little grain or the like to indigent persons distressed for subsistence and applying for a loan, and who take a writing for the debt at a high valuation, or who receive a very high price for a scarce and necessary article? Is the contract legal or not? The question is answered, as in the title of Loan and Payment: under the text of CÁTYÁYANA (Book I, v. 37, 1), interest voluntarily promised must be paid; but if the promise have been extorted by force, such interest shall not be paid: so, in this case, a price or the like, voluntarily agreed on, stands good; but if consent have been extorted, it does not stand good. For example, a man, distressed to provide for his father's obsequies, wishes to sell his own furniture; but, not *readily* finding a purchaser, applies to some person, saying, "assist my occasions;" the other, hearing all the circumstances, replies, "this is your purpose, but I desire gain;" and the vender rejoins, "I know that my purpose must be accomplished by you at the expense of your own wealth; I am fully satisfied to sell at a low price:" in such a case there is no offence in buying at a low price. But, should he, being of a harsh disposition, and desirous of purchasing the thing at his own price, offer to a man, who cannot go elsewhere, half the price at which such things are sold on all sides, and bid him go where he pleases *if he will not take that price;* in that case a purchase at such a price is not valid: and the same must be understood of fixing an excessive price, according to the circumstances of each case. But there is no offence in traders who keep a store of commodities for a long time, if they receive a high price, voluntarily paid for a scarce article: there is offence in obtaining a high price by deceit, harshness, or the like. All this is stated as resulting from the reason of the law, on the exposition of the text as delivered by MISRA: it should be examined by the wise.

CHANDÉSWARA, inserting this text among those which show sale without ownership, says nothing expressly regarding it. After the text of VISHNU (56) he inserts the following text:—

58.

NÁREDA :—An open purchaser is clear of imputation, but a purchase in secret is a theft.

After this text, inserting the text of VRĬHASPATI (57), he subjoins the text of NÁREDA (38) as expounding the sense of the preceding text. If the text of VRĬHASPATI (57) relate to sale without ownership, the sense is this; "delivered by a person pretending to be the owner." The term *(adhyacsha)* signifies one capable of such transactions as sale and the like. Civil contract is among the senses of *acsha* in the Dictionary of AMERA. According to this interpretation, "from a man not known to be honest" *(asatah)*, so expounded by CHANDÉSWARA, is pertinent in the literal sense of the terms. It is mentioned to intimate that there is no offence, if the man, though in fact a thief, have the appearance of being no thief. But, according to the opinion of MISRA, it means, from a person not praised *or revered, that is*, from an infant or the like. AMERA mentions praised among the senses of *sat*. Or fraudulent purchase is here described generally.

59.

YÁJNYAWALCYA :—He who shall receive from the hand of a stranger, what had been taken from him, or what he had lost, without giving notice to the king, shall be fined ninety-six *panás* of copper.

He who receives it, without giving notice to the king that his property had been taken away by that person, shall be fined ninety-six *panás*; for he is guilty of concealing a thief. The *Retnácara.*

He shall be fined, because he deprives the king of his due. MISRA.

A fine is due from the thief to the king. Thus both glosses agree. A fine has been declared in the case of a sale of lost property by a stranger; consequently there is nothing incongruous.

Is there no offence in selling a waif? There is if it be sold within the space of three years, but not if it be sold after that term; for it is proper that another should observe the same rule which is prescribed to the king.

60.

MENU :—Three years let the king detain the property, of which no owner appears, *after a distinct proclamation*: the owner, appearing within the three years, may take it; but, after that term, the king may confiscate it.

2. He who says, "this is mine," must be duly examined; and if, *before he inspect it*, he declare its form, number, and other circumstances, the owner must have his property;

3. But if he show not at what place and time it was lost, and specify not its colour, shape, and dimensions, he ought to be amerced.

It must be noticed, that if the owner, showing the time and place, and so forth, claim the thing even after three years, he may recover it, provided he had not neglected it. However, by the text of MENU, there is no offence in selling it after that term, if it be not claimed. Accordingly, since a waif is to be taken by the king, a man shall be punished if he appropriate it without acquainting the king.

61.

MENU :—One commodity, mixed with another, shall never be sold *as unmixed ;* nor a bad commodity, as good ; nor less *than agreed on ;* nor anything kept at a distance, or concealed.

Goods dyed with saffron and the like, mixed with goods dyed with safflower and similar drugs, shall not be sold *as unmixed,* nor a bad commodity as good ; nor less than the weight agreed on ; nor a thing which is at a distance ; nor goods which have lost their colour: this being similar to a sale without ownership, the punishment shall be the same.

CULLÚCABHATTA.

What quantity shall be taken to determine the proportion of punishment similar to that of larceny? It is said, so much as is the proportion of the inferior commodity mixed with another ; or, computing the price of good and bad commodities, so much as is the gain by selling a bad commodity at the price of a good one, and similarly in other cases : for there is no theft in regard to the other portion of the sale.

The law of sale without ownership being extended to this case, the fine for a kinsman is six hundred *panás.* It must be considered, in the case of sale without ownership, that if a trifle be sold by a kinsman, the fine should not be six hundred *panás :* for this would be disproportionate. Where the fine for theft be six hundred *panás,* he should pay the same ; and it is the limit of his amercement : but where the fine for theft would be less, he should pay the same fine as a thief : and let it not be objected, that there is no argument whence to deduce whether six hundred *panás* be intended as a less or greater amercement than the fine for theft ; it is proper that the fine be less, since a kinsman is entitled to the use of the property.

CHAP. III.

ON CONCERNS AMONG PARTNERS.

SECT. I.—*On Partnership in Trade and Adventure.*

1.

NÁREDA:—When traders, or others, jointly carry on business, it is called a Concern among Partners, a title of judicial procedure.

"Jointly," on a joint stock. The *Retnácara.*

The word signifies 'mixed' or 'united;' for the verb *bhú*, compounded with the prefix *sam*, signifies mix. That union is formed by means of a joint stock, or by means of united personal efforts. Thus five traders, uniting their capital, carry on trade by purchase and sale of commodities; or five men, receiving wages, undertake jointly to assist the business of some rich person. The exposition of the *Retnácara* must be understood as illustrative of a general sense. The meaning of the text is subjoined: the expression "and others" comprehends officiating priests receiving a stipend and the like. The union of capital, or exertion, for work, for commerce, for effecting some business, for a sacrifice or the like, or the same work performed by several persons on a joint stock, or with united labour, is a concern among partners, or is a common exertion by partners; the inflection of one case being substituted for another. Consequently the performance of the same work by two or more persons uniting by means of joint capital and so forth, is a concern or common exertion of partners (*sambhúya samutt'hána*); *st'há*, preceded by *samut*, signifies performance of work. Or the relative is employed in the seventh case with the sense of refuge or prop, as in the example "resides with his preceptor:" consequently that agreement or rule, on which business is jointly conducted, is a title of law called Concerns among Partners. The pronoun is used in the masculine gender, as in the text of VYÁSA (Chapter II, v. 4).

With what persons should partnership be contracted; and with what persons should it not be contracted? This question is answered in the subjoined text:

2.

VRĬHASPATI:—Prudent men should not carry on trade, or the like, jointly with persons deficient in capacity or industry, afflicted by disease, ill-fated, or destitute of friend *and home:*

2. Let a man carry on business jointly with persons of high birth, able, diligent and sensible, skilled in coins, in purchase and in sale, honest and persevering.

In all affairs, an incapable man should be excluded. An indolent man, who neglects business, though able to perform it, should in general be excluded: in some instances, however, as in the duties of an officiating priest, the exclusion is not essential. The exception of a person afflicted by a distemper, which disqualifies him for business, is proper, for he is incapable: it is repeated, because the exclusion of a person, in whom disease has made its first appearance, is necessary on some occasions; and a person afflicted by a disease indicating a taint of sin, must be excluded from the performance of sacrifice, though otherwise capable; for, even pure persons, jointly performing a religious rite with him, would be dishonoured, since no benefit would arise from it. Outcastes and the like should also be excluded from the performance of a sacrifice or other ceremony; for the term is illustrative of a general meaning. "Ill-fated;" not destined to acquire wealth, gain, honour, and the like: it may be known from his horoscope, or from the visible result of his actions: he must be shunned in the concerns of traders and the rest. "Destitute of friend" or protector; such a man is excepted in concerns of trade and the like; for, should a disposition to knavery or wickedness arise, it would not be repressed: or, "destitute of home;" excepted in the apprehension that such a person might abscond with the property.

"Persons of high birth;" a person sprung from an honourable family will not be disposed to break his engagements, even though his life be endangered. "Able;" skilled in business. "Diligent;" attentive to business without considering his own ease: such a person is superior to men in general. "Sensible;" capable of contriving expedients when distress occurs: even in the performance of religious rites, the ceremony miscarrying, a person acquainted with the modes of expiation or the like may be required; other cases are obvious. "Skilled in coins;" explained in the *Mitácshará* stamped money, gold *nishcas* and the like, conversant with these, and with silver coins and the rest, and skilled in distinguishing coins which contain copper or the like: in commerce his excellence is obvious; in other affairs he is also useful. "Skilled in purchase and in sale;" in commerce, he who is conversant with purchase and sale, knows the profit to be made: in other instances, it must be explained according to circumstances. "*Honest*, or pure;" is referred to constant, occasional, or voluntary rites, or to concerns in general.

Is not the direct precept superfluous, since partnership is of course permitted with persons different from those excepted; or the exceptive text superfluous, since persons, different from those with whom partnership is directed, are of course excepted: and thus, is not the repetition superfluous? No: the exceptive text is necessary to exclude the persons *therein* described; and the direct precept is necessary to denote, that the persons described *in it* should be sought for. All persons different from those described in the second verse, are not to be excluded: persons not of high birth, nor yet deficient in capacity, and so forth, may be admitted: but if a person of high birth, and so forth, be found, he should be preferred. This sense is inferrible. The text is a precept of ethicks, showing present good and evil: therefore, should the precept be not observed, present evil, as loss, strife, or the like, ensues: but it is no breach of duty; on the contrary, anyhow to maintain a person afflicted by disease is a duty: and there is no offence in sometimes admitting an indolent person *into partnership*, on an agreement for conducting commerce upon the stock of one by the labour of another. It must be considered, that, if all exclude incapable persons and the rest, it follows that all *partners* must be capable: consequently, a partnership of capable with

incapable persons is forbidden. In some instances, a partnership may exist, of persons all deficient in capacity; for none of them are incapable, compared to each other: but if, among persons of similar rank, one be superior, respect should be shown to him.

3.

NÁREDA:—The junction of stock is the cause of men carrying on business in partnership with a view to gain; therefore each should contribute his share to the common exertion.

"Junction of stock;" union of capital. "Is the cause;" is the efficient means. "Therefore," that is, for this reason, they shold make exertions in proportion to their shares. The text is so expounded by CHANDÉSWARA. Without a capital, or stock, trade cannot be carried on; therefore, let all contribute wealth, and supply what is required for trade, as the hire of boats, oxen, and other carriage. "In proportion to their shares;" that is, let not one furnish the whole, as appears from a text which will be cited.

4.

NÁREDA:—As the share of a partner, *in the common stock, or in work*, is equal, or more, or less, in the same proportion shall his charges, loss, and profit, be *equal, increased, or diminished.*

As the share of each partner in the whole capital is less, more, or equal, so shall be his "loss" on the capital, by the sinking of a boat or the like: the loss shall be settled in proportion to the share *of stock.*

"Charges;" necessary charges; the king's taxes, and the hire of boats and the like. "Profit;" gain. If trade be again carried on upon the profit added to the original stock, the loss and profit is shared, as abovementioned. Both texts may be applied to agriculture and the like, unless more be expended by one of the partners, of his own authority. In directing that the charges, loss, and so forth, be increased or diminished in proportion to the share of a partner in the common stock, the same is understood of labour; as is clearly expressed in the following text:—

5.

VRĬHASPATI:—As his share of the outlay is equal greater, or less, in the same proportion, *unless there be a special agreement*, shall each partner pay charges, perform labour, and receive profit.

"Charges;" loss by the sinking of a boat or the like; and disbursement for the payment of the king's taxes, and so forth. All this supposes that there is no special agreement.

6.

YÁJNYAWALCYA:—In a partnership among traders who carry on business with a view to gain, let the profit and loss be distributed to each according to his share in the stock, or according to special agreement.

If there be no special agreement, the distribution must be regulated by the shares in the stock; if there be a special agreement concerning profit and loss, let the profit and loss be distributed accordingly. The *Chintámeni.*

Profit and loss are mentioned as instances merely; for the reason of the law is equally applicable to labour. The *Retnácara* concurs in the same exposition, but reads, in the fourth measure of the verse, *yat'há vá samvidá critau*, instead *yat'ha vá samudáhrĭtam*: it is expounded 'or as settled by a *special* agreement.' According to this opinion, more is allowed, under a special agreement, to one of the partners, from a motive of respect or affection: but, extorted by force, such an agreement is null. (Chap. II, v. 10).

If there be a special agreement in respect of labour, it is expressly declared that the contribution shall be unequal.

7.

NÁREDA:—Let the partners, unless bound by *a previous* agreement, duly contribute to the stock, to the charges of living and of trade, to the deductions and weights, and the care of valuable articles.

"Stock;" store for purchase and sale. "Charges of living;" way-charges. "Charges of trade;" hire. "Deductions" made, for particular purposes, from the joint property. "Load;" weights. "Valuable articles;" sanders wood and the like. "Duly," as is proper. "Unless bound by agreement;" not being bound, no special agreement having been previously made.

The *Retnácara*.

"Way-charges:" if one of four partners go to a foreign country to buy or sell, let all the partners defray his way-charges, and similarly defray the charges of his maintenance while living abroad; for the reason of the law is equally applicable; and it is equally intended by the text, since the word hire signifies food in general. "Charges of trade, or *hire*;" the term is illustrative of a general meaning, comprehending the king's taxes and the like. "Deductions" may occur where an excess has been given by mistake, and in other cases: there is no objection to the explanation of this term as intending debt: if it happen that a purchase, or the king's taxes, cannot be supplied from the stock already accumulated, it being then necessary to contract a debt, the debt contracted by the partner sent abroad, who, though not expressly authorized, has not been restricted from contracting debts, must be paid by all the partners. But this is not mentioned in the *Retnácara*. "Load," explained weight, intends the weights *used in commerce* and so forth. Let them provide and defray those several articles. By the expression 'and so forth,' gift and the like is comprehended *in the gloss*. "As is proper;" in proportion to their shares. "No special agreement having been previously made;" an agreement for exemption from labour not having been made at the time when all united *in partnership*; not being bound by such an agreement.

Others explain the text, "Let all apportion the vessels, the accumulation, the charges, the expense of transport and of custody, and the durable shares." If any misfortune happen, it shall not fall on one of the partners. But, if there be an agreement for proportioning the labour, all shall not perform all the work, but they shall furnish labour respectively, according, to agreement: as is intimated by the concluding part of the text. Or, if there be an agreement, that one of the partners shall contribute no labour, it must be so settled.

Both opinions should be admitted; for they are proper: and what is consistent with common sense, though not mentioned in either exposition, must necessarily be understood as comprehended in the sense of the text.

8.

VYÁSA:—Never deceiving each other, present or absent, let them make sales and purchases according to *the value of* the various articles.

Here the privative *a* must be interposed; "not deceiving:" that is, let them transact business, never deceiving each other. The *Viváda Chintámeni.*

Deceit in the presence of the partners consists in appropriating things under false pretences, or in not making due exertions. Thus, one of the partners takes a thing and says, in the presence of the rest, "I take my private property which was placed here;" or he misstates the price paid for a commodity. Deceit in respect to labour may be thus: when sent for any business, he says, "this business is not to be performed by me;" or says, "I have performed much labour, let this business be done by you." Deceit in the absence of the partners is obvious. Let them proceed according to the profit between the purchase and sale of the various articles, as cloves, nutmegs, pease, wheat, cotton, grass and the like.

9.

VRÍHASPATI:—They are declared to be competent arbitrators and witnesses for each other, in doubtful cases of deceit, provided they bear no enmity to either party.

"They;" the partners. The *Retnácara.*

If one of eight partners, being accused of deceit, does not charge a stranger with the fault, but simply denies the fraud, those partners who are neither accusers nor accused, may officiate as arbitrators to decide on the fraud alleged; and they may be witnesses. An exception is mentioned, "provided they bear no enmity to either party," to the accused or accuser. The meaning is, that, if there be any dispute concerning trade in partnership, the arbitration of the partners may in some instances be admitted; but the evidence or arbitration of strangers or king's officers is not forbidden.

Others read the latter part of the text, "let them not, from an impulse of hatred, expel a partner on pretence of fraud."* Though naturally averse from him, yet unable from modesty or other motive at first to refuse him, having thus, from false shame or other cause, once admitted a person not agreeable to them, should they, recalling their aversion, attempt to expel him on a false accusation, let the king prevent them.

How then shall he be cleared? In the mode mentioned by VRÍHASPATI

10.

VRÍHASPATI:—Should one of the partners be justly suspected of fraud, in buying, selling, *and the like,* he may be cleared by ordeal: such is the rule in all controversies.

This text propounds the mode of trial. "Justly suspected of fraud; though guilty of fraud, but with some doubt; for, if it be certain, he cannot be cleared by ordeal. If he be not cleared by popular proof, nor be convicted of fraud, he may clear himself by ordeal: it is not ordained in the first instance; for a text directs, "on failure of these several proofs, one of the

* The various reading is on the fourth measure: *na dwishyur dwéshasanyutáh,* instead of *yé na dwidwéshasanyutáh.*

several ordeals is ordained" (Chapter II). Sufficient cause of suspicion must be shown to ground *this* procedure upon, not merely that he has been much employed in the transactions of the joint trade : this observation is grounded on the opinion of RAGHUNANDANA, in the *Dáyabhága tatwa ;* "otherwise partition of heritage could never be made without ordeal, for knavery may be always apprehended."

If one of the partners, skilful in business, have with much labour transacted sales and purchases at home and abroad ; and, when partition is made, if he be suspected of fraud ; let him not in the first instance undertake ordeal, but say, "examine the sales and purchases." Then, should his story be inconsistent, or should he allege a delivery to a person to whom it is not proved that anything was delivered ; in this, and similar instances, suspicion justly arising, a judicial procedure is proper. But otherwise, his conscience is his witness.

Ordeal may be required in a case of fraud in regard to labour. Thus, one of several partners, bound by a previous agreement, purchases commodities in another country ; another brings those commodities home ; a third sells them at home : in such a concern, goods, which were brought by water on a boat, being destroyed by a storm, the partners, on hearing of it, say, "they were lost by thy neglect ;" the other replies, "I did not neglect them :" in this, and similar cases, *ordeal is directed.* "Such is the rule in all controversies :" even in other cases, in regard to loans and so forth, if there be suspicion, the party must be cleared by ordeal or other evidence. Evidence in general is intended. So the *Retnácara* and *Chintámeni.*

11.

VRÍHASPATI :—When the principal stock or the profits are diminished, in the case of partnership, by the act of GOD or of the king, that loss must be borne by all the partners in proportion to their shares.

When the accused is cleared by ordeal or other evidence ; and it is proved that the goods were lost, without any neglect on his part, by the act of GOD or of the king ; that loss must be borne by all the partners in proportion to their original shares. He repeats what he has before said (5) ; or the word may be there understood as intending charges only (such as payment of the king's taxes and the like), not loss : but the same rule is extended to a loss which happens without negligence ; that is, a loss which happens notwithstanding the utmost exertions made to prevent it ; or a loss which occurs when the partner, through inadvertence, placed the goods in a perilous situation, without suspecting the danger. According to the *Retnácara*, the first loss or diminution mentioned in the text intends loss of capital ; the second, loss of profit : and MISRA gives the same exposition. If the loss be total, it must be proportionally borne by all the partners ; if profit only be lost, shall it be borne by that partner who had charge of the concern when the loss happened ? To remove this doubt, the text expresses, "when the profits are diminished, &c." If profit be lost with capital, it is proper, on the ground of favour, that the partners should share the loss of profit ; but shall the loss of capital be borne by him who managed the concern when the loss happened ? To remove this doubt, the text expresses, "when the principal stock is diminished, &c." The same decision should be given when the profits are diminished by waiting for a rise or fall of price. An exception is mentioned in the following text :

12.

VRIHASPATI:—But, if one partner, acting against or without the assent of the others, by his negligence injures the common property, he alone must indemnify all the partners.

"Without the assent of the others," unknown *to them*: so the *Chintámeni*. It may signify 'not sent to bring goods from a country where they are cheap.' It does not intend a case where, having gone to that country on such a mission, the partner, when returning thence, by accident, without the knowledge of the rest, meets with a dangerous place; else a partner could never go to a foreign country, where he must act without directions from all the partners, since they would not be present.

"Against the assent of the others;" forbidden to go at that time. For example: one partner wishes to travel by water carriage to a foreign country; the others consent, but say, "wait this day, incursions are expected from the army of a foreign prince." The person employed, nevertheless, goes that very day; and the goods are plundered by the army of a foreign prince. In that case a fault is imputed to the partner acting against the assent of the others.

In the case supposed, if the goods be not plundered by the forces of a foreign prince, but the boat happen to sink in a storm, what shall ensue? It cannot be argued, that the loss must be made good by him, during whose management it occurs, because the goods are lost by a person acting against the assent of the others: the motive of forbiddance being different, the prohibition is nothing to the purpose. Not being wholly dependent on their commands, shall he not follow the road of gain, although a motive of objection be set forth, if he be able to counteract the cause of objection? Nor should it be argued, that, were it so, the loss must be borne by all. If he had not gone that very day, the boat would not have been lost.

To the question thus proposed, the answer is, the loss of the boat, happening in a storm, is accidental and unforeseen: it is the act of GOD. But if he quit the rout to elude the enemy, and the boat be wrecked in consequence, he must make good the loss. Other cases must be determined on the same principle.

"By his negligence," is a general expression comprehending the act of GOD or of the king. It appears from this expression, that a loss, happening by the negligence of a partner not acting against or without the assent of the others, must be borne by all the partners.

13.

NÁREDA:—And what is lost by the negligence of one *partner* acting against or without the consent of all the partners, must be made good *by him.*

The import is the same as in the preceding text. The particle is used in the sense of "and."

14.

YÁJNYAWALCYA:—If one partner does what the others forbid or disapprove, or if he be negligent *in doing what they allow,* and the *common* property be injured, he shall make it good; but he who

preserves it from *robbers* or *other* misfortune, shall receive a tenth part of it *as his reward.*

The property being endangered by the act of GOD or the king without any fault on his part, if one partner preserve it by his own exertions, he shall receive a tenth part. For example: a fire accidentally happening where the whole stock is hoarded, if one partner extinguish the fire by his own exertions, or be able to save the goods, he shall receive a tenth part as his reward. So, if he recover goods sunk by a storm in the middle of the river on their way from a foreign country, throwing himself into the water at the risk of his life, and dragging them on shore, he shall receive a tenth part. Even in the case beforementioned, if one partner, going to another province against the assent of the others, save the goods from the army of a foreign prince, by his own exertions, by insinuation, or by artifice, and gain considerable profit, it is reasonable that he should receive a tenth part.

A tenth part of what? It is answered, a tenth part of all the goods saved. If the partner who goes even against the assent of the others, save the stock by eluding the enemy, or by other means, *but do not gain considerable profit,** shall he receive a tenth part of the stock *saved?* Since the danger arose from his own fault, he is not entitled to a tenth part. But if the boat be lost by the act of GOD, and he save any goods; in that case he shall receive a tenth part of those goods, and all the partners shall divide the remainder; as ordained by the following text:

15.

VRĬHASPATI:—If a single partner, when danger is apprehended from the act of GOD or of the king, preserve the common stock by his own exertion, a tenth part of it shall be given to him, and all shall have their respective shares of the remainder.

"Their respective shares," in proportion to their shares in the original stock: and the person who saved the common stock shall have his share; the tenth part is as it were his reward.

16.

NÁREDA:—He who preserves, by his own effort, the goods of the partnership, when a calamity arises from the act of GOD, from robbers, from the king, or from fire, is entitled by law to a tenth part of them.

When danger only arises. The *Retnácara.*

17.

CÁTYÁYANA:—To him who shall preserve goods from robbers, water, or fire, a tenth part of their value shall be given: this is the rule in all sorts of property.

"Preserve;" save. The *Retnácara.*

Some infer, from the expression "all sorts of property," that if the several property of any person in danger of loss be saved by another, even

* I insert this reservation, to reconcile this and the preceding paragraph.

in that case whoever saved it shall have a tenth part of the property saved. That is not the opinion of CHANDÉSWARA and MISRA; for this text appertains to the title of Concerns among Partners. Nor should it be argued, that if a stranger preserve any property belonging to joint traders from danger of loss, he shall receive a tenth part of it; but CHANDÉSWARA and others deny the reward of a tenth part in case of a salvage of property belonging to a single owner, as is expressly declared by them in these words: 'some hold, that the rule is the same in all sorts of property, even though 'it belong to a single owner; but that is not admissible, because it is inconsistent with the title *under which the text is placed*.' This *again* is supposed, on the same objection, that it is inconsistent with the subject; for the subject proposed is the rule of decision when one of the partners preserves the goods from robbers and the like, not when they are saved by a stranger: and it has not been so declared in the *Cámadhénu*, nor by HELÁYUDHA, who hold that this has the same import with the text of NÁREDA. CHANDÉSWARA and others hold, that the tenth part of the property saved shall not be received, in the case of property belonging to a single owner, which is preserved from robbers and the like. Consequently they concur with the *Cámadhénu* and with HELÁYUDHA.

What then is meant by "all sorts of property?" The profits and the principal stock. Or it may be thus explained; there is not, in this case, any such distinction as that which is declared under the title of Loans and Payment, in regard to the highest interest on gold, grain, wool, fruits, flowers, and so forth: but a tenth part of any property saved shall be received, whether it be gold, precious stones, pearls, pepper, quicksilver, grain, wool, grass or the like. This is denoted by the very expression 'all sorts of property:' thus the epithet "all" denies any other rule in regard to any sort of property, no distinction being anywhere specified between joint or several property: but it must not be objected, that, if such be the case, whence is an exception deduced in regard to the property of a single owner? It is deduced from the subject: consequently the meaning is, "this is the rule in all sorts of property, whether gold or any other commodity, belonging to persons engaged in partnership."

If any man, by his own labour, save the property of partners, or of any other person, in danger of loss by water, fire, robbers or the like, what shall he receive? Although it be not ordained by the law, something should be given to him as a token of respect, or as a recompense, on the authority of the law concerning other cases, or on the induction of common sense.

It is inferred, that, among ten partners, if three join in saving any property which is in danger of being lost in a river, or of being destroyed by fire, those three persons shall share one-tenth part only, which should be distributed in proportion to their respective exertions.

If one partner opposed the attempt of saving *the goods*, another remained silent, and the third approved the attempt, what is the law in this case? He who opposed it shall have no share of *the gain on* those goods: the person who remained silent shall have the share *regularly* allotted to him: and so shall he who assented to the attempt; but he shall receive something more than the other, as is declared by ÁPASTAMBA in respect of those who cause an act to be performed, who assent to it, and who actually perform it:

"They all share the retribution in heaven, or hell; but there is a difference in the reward of him with whom the act originates."

Who shall receive the share of him who opposed the attempt? Not all the others, for there is no law to give a title to the person who remained silent; not the salvers only, for that is inconsistent with common sense: thus, if a stranger save the property of another, which is in danger of loss by water or the like, he is not entitled to the whole; and in this case, how can the preserver be entitled to the whole, since he is a stranger in regard to the property of another? the law admits not a distinct kind of ownership founded on union of stock.

The question proposed is thus answered: the person who opposed the attempt shall receive his proportion of the capital stock; therefore, the capital stock shall be divided among all the partners, after giving a tenth part of it to the salvers: but the profits, after paying a tenth part to the salver, shall be divided in proportion to their shares among the other partners, solely excluding the person who opposed the attempt; for it will be shown, that even a man of crooked ways forfeits the profit only.

Is this a man of crooked ways? or does he not rather intend kindness? The man of crooked ways opposes another, lest a share of the labour should fall on himself; it is proper he should lose his share of the profit: but this man opposes the attempt to preserve his partner's life, as he would his own; he opposes it, to save him from pain, thinking the fire irresistible: why should he lose his share of the profit? When he opposed the attempt, even then he forfeited his property; the profit belongs to him who, regardless of his partner's objections, and little valuing the preservation of his own life, plunges into water, or rushes into fire, to save the property; but the partners, who assented, or remained silent, shall have a share, for they had not abandoned the property: it is however proper that something be given to the partner who opposed the attempt.

Has he not forfeited even his principal by abandonment? That should not be asserted, for he has not absolutely abandoned it. When the goods were carried away by water, his reflections are: "What can be done? They are lost irrecoverably!" He does not abandon them by a declaration that he has no further interest in them. Shall his condition be the same with that of a man of crooked ways; for even that man loses the profit only? It is not a satisfactory opinion which deems that admissible; for it is inconsistent with reason that the condition of a man who intends a kindness, but is unable to traverse the water, though otherwise qualified for business, should be the same with that of a man of crooked ways. It must not be argued, that even his principal should not be given to the man of crooked ways. There is no ordinance to that effect; for YÁJNYAWALCYA would have said, "without stock," instead of saying, "without profit," (18). Nor should it be affirmed that this law must be understood of the case when toil is omitted through indolence; but, in the case supposed, even the principal is forfeited. It is not fit that the property of one, saved by another, be retained by the salver, without the owner's assent declared in this form; take the property you have saved." Neither should it be argued, that all profit is forfeited by obliquity of conduct; for it is inconsistent with common sense that a man who had previously done nothing perverse or dishonest, and had acquired profit by his own labour, should now lose all profit on account of his conduct in a moment of great danger. No forfeiture is incurred by opposing the attempt, from a motive of affection or the like, without fraud: but if it be opposed from a perverse motive, the profit is forfeited: the salver shall receive a tenth of the principal and profit.

If a partner be convicted of fraud, the loss must be made good by him : this is shown by the direction for distributing shares to all, if honest. His expulsion is *also* directed.

18.

YÁJNYAWALCYA :—A man of crooked ways let the other partners expel without profit; and let a partner unable to act, appoint another man to act for him.*

Let the partners expel a man of crooked ways, (that is, a fraudulent partner), without profit, giving him his principal stock only : but let him, who, though not fraudulent, is unable to act, appoint for his substitute another man able to act. The *Retnácara.*

MISRA delivers the same exposition.

A fraudulent partner is of two descriptions ; one who is averse from the performance of work, and one who embezzles property. In regard to performance of work, a distinction must be admitted, as suggested by common sense : the fraudulent partner forfeits the profit on that part in regard to which he offends ; not the whole profit. A partner having bought goods without fraud, sells them ; and afterwards adopts fraudulent ways in his sales and purchases, but has committed no fraud in regard to the first goods : in that case he shall have a share of the profit ; but he forfeits the profit on that part concerning which the fraud was committed. In all cases, however, the fraudulent partner shall be expelled ; for fraud is sufficient cause of expulsion.

If he perform the labour directed in regard to sales and purchases, but neglect the preservation of the goods, what shall follow? If there be no specifick agreement, and the share of the business regarding purchase and sale be performed by the directions of the other associates, then, should he neglect the preservation of the goods, he shall be deprived of his share in the profit; otherwise, the text would be unmeaning : and it is not restricted to neglect of business from the first day *of the partnership*. But if he say, "I have skill in all other affairs, but not in the preservation of goods," there is no perverseness in him : therefore he may partake of the profit, by their favour. Or the maxim, "let a partner unable to act appoint another man to act for him," may be applicable to this case; therefore, let him engage some other person to preserve the goods. On this point a distinction is mentioned.

19.

NÁREDA :—Should one partner be unable to act, his heir shall undertake the work; or, if there be no heir, another *partner* who is *willing and* able to act; if there be no such person, all *the partners*.

"Disability;" calamity, or incompetence: meaning calamity from a moral cause. "Heir;" the son, and so forth. "If there be no heir;" if the heir be unfit or unable, or if there be no heir present, another partner, who is able to act for both, shall undertake the preservation of the stock ; if there be no such person, all the partners ; for partners must be necessarily understood, since it would be improper to understand "all" as intending the world at large ; and, from the context, partner must be understood even

* See V. 31.

in the middle of the text: thus, "heir" must be understood of a partner; and the term comprehends kinsmen. If one partner be disabled, he among the partners who is heir to the disabled partner should undertake his work; if he refuse it, let the king *formally* appoint him: no other can act for him, if there be an heir capable of acting. But if there be no heir, or if he be incapable of acting for both, let another, who is able to act for both, undertake the work. Thus "able" is pertinent, otherwise it would be unmeaning; since a capable person may be unable to act as a substitute. The appointment of the substitute is referred to the king, because there is no other person to whom it could be referred.

If there be no such capable person, let all the partners preserve the goods. The texts of YÁJNYAWALCYA and others (14, &c.,) being applicable to the present case, the salver or salvers shall have a tenth part of the property saved. This is inferred by CHANDÉSWARA.

If partners be understood in this text, another person may not be employed at the choice of the principal, on whom it is incumbent to preserve the goods. This *objection* is not consistent with reason, for *even* the heir may not be employed unless he be included in the partnership. Nor should it be argued, that the same rule may extend to a separated kinsman, if there be no undivided brethren capable of acting; for such an extension of the rule has no foundation in any ordinance, nor in the reason of the law. Nor should it be argued, that the rule is grounded on the reason of the law; because otherwise the word "able," in the text of NÁREDA, would be unmeaning: it may be taken as a descriptive epithet *nearly superfluous*. If another person may not be employed at the choice of the principal; then, of course, the partners should preserve the goods, and receive a tenth part as their reward.

MISRA, thinking the application obvious, has not expressly said, that the heir, and other persons mentioned in the text, are included in the partnership. It should not be objected, that MISRA expounds the text, "should one *partner* die, &c.;" how then should another person be employed at his choice? MISRA therefore could not have contemplated such a construction. Still it is difficult to disprove the supposed disqualification of his heir not included among the partners. We therefore hold it proper, in this case, to follow the exposition of CHANDÉSWARA, "If one partner be unable to act, let his heir undertake *the preservation of the stock, &c.*" and in this case another person cannot be employed at his choice: but if there be no son or *near* heir, a more distant heir, included among the partners, should undertake it; next, another *partner* able *to act;* or if there be no such person, all the associates. Such is the successive order. The son of a disabled partner being properly under his authority, it is not necessary that another heir should be employed, if a son be forthcoming; but, on failure of a son, he should be employed; otherwise the special mention of "heir" in the text would be an unmeaning repetition. It should not be argued, that, if another act *for a disabled partner*, although an heir exist, the text is propounded to show that the heir, complaining before the king, may prevent it. There is no argument for selecting this limited construction. If the heir refuse the undertaking, and another partner accept it, then his employment is not disputed. In fact the heir ought to perform the work, because such is the actual course: for, on the death of the father, his obligations devolve on the son; but, in his default, a substitute should be appointed. Therefore the *Retnácara* shows, that the heir shall receive a tenth part of property

saved by him. If the person be selected at the choice of the principal, he shall receive a tenth part, or other reward as may be agreed on between them: but for others, the reward is a tenth part of the property saved; for it is ordained by Sages treating of the same subject. A tenth part of what? Shall it be a tenth part of the principal stock and profits, or of the profits only? On the first supposition, in what does the situation of the partner differ from the situation of one who forfeits his share of profit, since the gain does not always exceed a tenth part of the principal? On the second supposition, he, who saves the stock only, would have no reward. Both objections are wrong: for the situation of the partner does differ when the gain may exceed a tenth part; and if the principal stock only be preserved, the reward *paid* may be re-placed by a share of future profit. But the rule of decision is this: a tenth part of the property saved, both the principal stock and the profit *being preserved*, shall be received by the preserver of it; and this rule concerns property saved by exertion, not by the act of GOD, while the partner merely talked of saving it.

Him who embezzles the joint stock let the partners expel without profit, after taking back the property embezzled. Loss of profit shall be his punishment; for no distinction is mentioned, in regard to fraudulent partners, in the text of YÁJNYAWALCYA (18).

If any trader die, what shall be done in that case? This question is answered in the following text:—

20.

NÁREDA:—If any travelling merchant, coming from a foreign country, should die, the king shall keep his stock until his heir appear.

2. Should he have no kinsman in a direct line, let the king deliver it to persons allied to him, or to collateral kinsmen; and if no such heir appear, let him keep it well guarded for ten years.

3. Such property without an owner, and without a claimant as heir to the deceased, let the king, when it has been kept ten years, appropriate to his own use: thus justice will not be violated.

MISRA thus interprets the texts; if one of several partners die, it is directed by the preceding text (19), that his heir, another partner, or all the partners, shall preserve the stock; but if all the partners die, the rule for that case is delivered in these texts (20). According to his opinion, if one partner die, there is no reference to the king; but his partners shall preserve his stock, and deliver it, as the king is directed to do, to his heirs, near kinsmen, or collaterals: on failure of these, let it be delivered to the king, like an *escheated* inheritance.

But, according to CHANDÉSWARA, the first text (19) describes the persons who should preserve the stock of a living partner when disabled: and the rule, in case of death, is declared in the subsequent text (20). Consequently, if one of the traders die, notice should be given to the king; and the king shall preserve his stock, and afterwards deliver it to his heirs when they appear, retaining a twentieth or other portion of it (22) as a recompense for his care: but, on failure of heirs, he may appropriate the whole to his own use. A distinction will be mentioned in explaining another text. This is *also* to be understood of a case where all the traders are deceased.

Others hold, that, if any trader be unable to act, his son, as heir, shall perform his work; in default of the heir, any partner, or other person, appointed by the principal, shall perform it, and receive such compensation as may be stipulated; but if such person be not able to act, all the partners. A tenth part being directed by Sages for a case of salvage only, if the whole work be done, the recompense should be the half, or other proportion of the profit, according to circumstances. The expression "shall undertake it" (19), is not understood merely of saving the stock, but of business concerning the stock; and this has been declared by Yájnyawalcya, "let a partner unable to act appoint another man to act for him;" it is not positively required that the substitute shall be one of the partners. But Náreda expressly says "another," *that he may be employed or not* according to the possibility or impossibility *of appointing a kinsman*, and without any further meaning; for it is troublesome to establish a distinct regal duty, while the text may be explained as a mere repetition of a meaning which was obvious. It should not be argued, because a direct precept is preferable to a vain repetition, that it is therefore necessary to establish *it* a royal duty *to appoint the substitute*, since the text would be otherwise unmeaning: were it so, since another is commanded to perform the work in default of the heir, and, if he be unable to perform it, all the partners being bound to undertake it, the last case is superfluous; but there is nothing superfluous if it convey a *general* precept, since no objection exists *to such an interpretation*. If the man himself be unable to act, a substitute must in all cases act for him; and if there be no heir, any person may be appointed under the text of Yájnyawalcya; or if none be appointed, the heirs, or others included in the partnership, are declared by Náreda to be the proper substitutes: but if the partner die, the rule of decision is delivered in the subsequent texts, "If any travelling merchant, &c." (20).

This exposition seems accurate: let it be examined by the wise. We proceed to explain the texts of Náreda. "Coming from a foreign country" (20); travelling from one country to another, or arriving in a foreign country. Consequently such is the rule, if a merchant die on the road, or in a foreign country: and this is merely an instance; *for* nearly the same rule of proceeding must be understood, if he die in his own country. Misra reads *préyád abhyágató pi vá*, instead of *préyád abhyágató vanic;* the sense is the same, and obvious. What king? The king in whose dominions the merchants have their abode? or the king into whose dominions they have come for the purpose of trade? The king in whose dominions they trade is considered as their second king, because he receives taxes and protects them: therefore that king, hearing of a merchant's death, shall preserve his stock, and send intelligence of his death to the heirs, by means of a messenger. This is inferred from the expression 'until his heir appear.' If there be an heir, the property of another is like poison to the king who appropriates it; therefore he should immediately relinquish it. When the heir appears, what is to be done? The stock should be delivered to him, otherwise his appearance is useless. The following text is explicit:—

21.

Vrǐhaspati:—If one of the traders in partnership happen to die, his share in the stock must be produced before officers appointed by the king;

2. And when any man shall appear calling himself heir to the deceased, let him prove his right of ownership by *the testimony of* other men, and then let him take his property.

"Officers appointed by the king," to receive taxes from foreign traders: before those officers, as a channel of communication with the king, his share of the stock must be produced by his associates. "Heir to the deceased," such as son or other person entitled to the succession: let him prove his right, as son, kinsman, or partner, by the testimony of other men. NÁREDA declares the distinctions of title to the succession (20, 2). If there be no kinsman in a direct line, let the king deliver it to persons allied to the deceased, his wife, and the rest: on failure of these, collateral kinsmen are entitled to receive it. CHANDÉSWARA says, "on failure of these, his collateral kinsmen shall receive it:" and HELÁYUDHA says "on failure of paternal kinsmen, the succession devolves on the maternal uncle and the rest." Consequently the wife, the daughter, the daughter's son, the father, the brother, and the rest, and the maternal uncle and other heirs mentioned under the head of Inheritance, are entitled *to receive the stock* in the regular order of succession. In the text of NÁREDA (20, 2), "if no such heir appear" signifies if the heir do not attend, or if it be proved that no such heir exists.

If the stock be delivered to heirs, a part shall be retained by the king as a recompense for his care of it. VRĬHASPATI ordains it.

22.

VRĬHASPATI:—Let the king receive a sixth part from the property of a *Śúdra;* a ninth from that of a *Vaisya;* a twelfth from that of a *Cshatriya;* a twentieth from that of a *Bráhmana:*

2. But after three years have elapsed, if no owner of the goods appear, let the king take the whole; but the wealth of a *Bráhmana* he must bestow on *Bráhmanas.*

A sixth part and so forth from a *Śúdra* and the rest in order as enumerated; for it is a rule, that terms mentioned consecutively are separately referred *to the correspondent terms:* construction by *the* correspondent order *of terms* may be exemplified as it has been used by a great poet, and in other instances: "the charms of the lyre, of the wreath of jasmine, of the blue lily, are surpassed by her delightful voice, her smiles, and her enchanting glance." Consequently the king shall receive a sixth part from a *Śúdra*, a ninth part from a *Vaisya*, and one part in twelve from a *Cshatriya.*

How can it be said that any part shall be received from the property of a *Śúdra*, since commerce is forbidden by MENU to a *Śúdra*, as a man of inferior class?

MENU:—A man of the lowest class, who, through covetousness, lives by the acts of the highest, let the king strip of all his wealth and instantly banish.

For commerce is declared to be the profession of a *Vaisya*, whose class is superior to that of the *Śúdra* (Book I, v. 4). It should not be argued, that the text of MENU supposes times free from distress. MENU, permitting *Bráhmanas* to follow trade in times of distress, forbids the sale of liquids, &c.

(Translation of MENU, Chap. 10, v. 86) ; declaring the means of subsistence for a military man in times of distress, he forbids his recourse to the highest function (ibid., v. 95) ; and, subjoining the text quoted, MENU expressly directs, that a man of the lowest class, who lives by the acts of the highest, even in times of distress, shall be punished by the king.

To this it is answered, that the text must be understood of a profession different from that of the *Vaisya*. Thus the text of YÁJNYAWALCYA is pertinent, "a *Śúdra* should serve twice-born men ; but if he cannot thus subsist, he may become a trader:" and the profession of a husbandman is allowed to the *Śúdra* by the *Nerasinha purána*, "let him rely on agriculture for his subsistence." On this ground the practice of money-lending by a *Śúdra* has been mentioned in the first book, on Loans and Payment. In fact, at this time, men of the commercial class being few, though a distinction has been ordained, their occupations are followed by *Bráhmanas* and by men of mixed classes. The rank of a *Śúdra* being attributed to *degraded* men of the military and commercial classes and to men, of mixed classes, and RAGHUNANDANA acknowledging that they become *Śúdras* by the neglect of their proper duties, it is fit that a sixth part should be received by the king from them also. If men of the *Ambashtha*, *Múrdhábhishicta* and other classes, who claims the rank of *Vaisya* and *Cshatriya*, have not for many generations performed the ceremonies ordained by the *Véda* in the form observed by *Śúdras*, or if they revert to the duties of their own class after expiation, the rate of the deduction ought to be regulated accordingly. But RAGHUNANDANA acknowledges that a military man, though not of a mixed class, may be degraded to the servile class, under the text of MENU,* in which he expounds "gradually," by small degrees ; "servile class," the rank of a *Śúdra* ; and "*Bráhmanas*," the scripture.

MENU :—The following races of *Cshatriyas*, by their omission of holy rites, and by seeing no *Bráhmanas*, have gradually sunk among men to the lowest of the four classes.

RAGHUNANDANA also admits the same in regard to men of the commercial and other classes. But this is not the opinion of CULLÚCABHATTA. Some persons of the *Ambastha* and other classes, observing the duties and assuming the title of a *Cshatriya* or *Vaisya*, act as men of the military and commercial classes ; some act as persons of the servile class ; and some follow the profession of their mother's class. The decision should be regulated by usage, or by the opinion of RAGHUNANDANA. More on this subject may be sought under the title of Mixed Classes.

"But, after three years have elapsed, if no owner of the goods appear" (22, 2) : if the person, *to whom notice is given*, send a message that he is sick, and will subsequently attend ; or send a message, or himself say, that the deceased had left a grandson, who will subsequently attend ; but if no heir do appear, then let the king take the whole ; but the wealth of a *Bráhmana* he must bestow on other *Bráhmanas :* so the *Retnácara*. The meaning is, that as the heritage of a *Bráhmana* cannot be taken by the king, so, even in this case, he may not appropriate the escheat.

23.

MENU :—The property of a *Bráhmana* shall never be taken *as an*

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* Erroneously cited as a text of NÁREDA. I find in MENU, Chap. 10, v. 43.

escheat by the king; this is a fixed law: but the wealth of the other classes, on failure of all *heirs*, the king may take.*

2. Let the king take all property, to which there is no heir, except that of a *Bráhmana:* but let him bestow the wealth of a *Bráhmana* on priests learned in the *Védas.*

If that be the case, how is he permitted to receive a twentieth part from the property of a *Bráhmana?* It should not be argued that there is no offence, because it is received as wages: it is merely implied in the text quoted (23, 1), that the property shall not be taken, on the supposition of a title *to inherit such property;* but the king may even sell the stock to a *Bráhmana.* Were it so, taxes being the wages of protection, even the receipt of taxes from a priest would be admissible. Therefore does MENU forbid it.

That is denied; for taxes are not the wages of protection, but are received by the king because he has a title in the soil. Nor should it be objected, that they sometimes appear to be his wages, like sacrificial fees *paid to priests.* Sacrificial fees are not real wages; if they were, there would be no distinction of fees for two sacrifices equally laborious. It is dishonourable in a king, anyhow receiving taxes, not to protect *all his subjects;* as it is in any man to omit the rites prescribed to his class, at dawn, noon, and eve.

Does not the king receive his revenue from the person who enjoys the produce of a soil in which the king has an interest, as he receives hire of *his own* house or chattel from the person who uses it? The law has prohibited the taking of such wealth belonging to *Bráhmanas;* for the property of a deceased *Bráhmana,* acquired by commerce, his heritage and debts, might *otherwise* be received on account of the interest the king has in the soil: but it is admitted, that the king has an original property by occupancy, in his own house *now* let on hire; not merely a property as king: consequently, he must avoid taking a *Bráhmana's* wealth, in right of a property in it as king. This subject has been sufficiently explained. But if the wealth of a deceased *Bráhmana* be not accepted by *Bráhmanas,* then let the king cast it into water (Book I, v. 231, 2).

In the third verse of NÁREDA (20, 3) "property without an owner" is explained by CHANDÉSWARA, property the owner of which is deceased: "without a claimant as heir," without a claimant entitled to receive it. It must be understood of all persons, other than the king, who are entitled to succeed, including the fellow student in theology, as declared almost expressly under the title of Inheritance.

24.

NÁREDA:—What is ordained concerning one of several *persons or things,* whose nature and properties are the same, must be extended to all; for they are pronounced similar.

The periods of detention, three years and ten years, are contradictory (20, 2 and 22, 2). The following text again propounds a different period:

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* Book V, v. 443.

25.

BAUDHÁYANA :—Property without an owner, which had not belonged to *Bráhmanas*, the king may take for himself, having kept it one year.

" Which had not belonged to *Bráhmanas* ;" which belonged to any other than a *Bráhmana*, that is, to a *Cshatriya*, and so forth.

CHANDÉSWARA thus reconciles the apparent contradiction, *in regard to the period of detention, one, three, and ten years* ; the period is proportioned to the time required for the heir to appear, according to the remoteness of his residence, distant, more distant, or most distant: and MISRA gives a similar exposition.

What is distant? what, more distant? and what, most distant? It cannot be said, that, if the heir reside in the king's own dominions, his residence is simply distant; in another realm immediately adjoining, more distant; or, if another kingdom intervene, most distant. At the time when one merchant died, a foreign realm intervened between the king's dominions and the town whence that merchant came: since he was settled at the greatest distance, his stock must be kept ten years. Afterwards, that king happening to conquer both realms, and some merchant from the same town dying, his stock may be appropriated after keeping it one year, since the place is now included in the king's own dominions. This would be a great disparity.

The difficulty may be reconciled on the opinion of RAGHUNANDANA, delivered in the *Udváhatatwa*, in explanation of the term " different country."

26.

Vrìhat-MENU :—Where language differs, and where a mountain or great river intervenes, it is called a different country.

2. However near, countries parted by a river of the same name are called distinct countries by the self-existent himself:

3. And so *are countries* whence intelligence is not received in ten nights.

27.

VRÌHASPATI :—Some call the space of sixty *yójanas* a distinct country ; some, the space of forty *yójanas* ; others again, the space of thirty *yójanas*.

To reconcile the distinctions grounded on language and on distance, RAGHUNANDANA thus explains the texts: if the three *circumstances of difference* exist, *the countries are distinct* within the distance of thirty *yójanas* ; or if two exist, and the distance be greater than thirty *yójanas* ; or if one exist, and the distance be not less than forty *yójanas* : but within sixty *yójanas*, if the language does not differ, nor a mountain or great river intervene, it is not a foreign country: so the *Śuddhi Chintámeni*.

Consequently this is intended by the term distant: if two *of the circumstances mentioned* exist, and the distance exceed sixty *yójanas*, the country is more distant; and if the three exist, most distant: but one of those circumstances must almost ever occur where the distance exceeds

sixty *yójanas.* "However near, &c." (26, 2); however near, (within the space of forty *yójanas*;) if the name of the countries differ, and a river intervene, they are called different countries. Some thus explain the texts. But others hold, that, if a river, or large body of water, of the same name with the countries, intervene, (such as the river *Sindhu* and others), the countries, however near, are called distinct countries: thus the eastern bank of the dangerous river *Sindhu* and is a different province from the western bank, both provinces bearing the same name with the river: and so *Pánchanada or the region of five rivers*, (meaning the *Sindhu* and other streams), is the name of a country.

"And so, whence intelligence, &c." (26, 2): this must be understood as a description similar to the distance of sixty *yójanas.* Or it may be thus explained: a place within a country of the same name is distant; no other country intervening, a bordering province is more distant; another country intervening, the remoter province is most distant: thus north *Rá'd'ha** is distant from south *Rá'd'ha; Magad'ha* is more distant; *Cásí*, most distant. Many other cases may occur, but these may be settled in a similar mode under the texts quoted.

What is the rule if the merchant's place of abode were near? The stock must be kept so long as the heir be expected to appear. In fact, on all occasions, sufficient time should be allowed: a specifick period is merely mentioned illustratively. The king may appropriate the stock of a deceased trader, at the expiration of one year, after ascertaining from his kinsmen in the same town, that there is no heir in a distant country, if it were supposed that such an heir existed. But if it happen that an heir afterwards appear, and, proving his right of inheritance, claim the stock, what shall be done in that case? Without relying on the king's property in that stock, it should be delivered to that heir, even though it have been given to some other person; for a gift without ownership is void. Let it not be objected, that the king is consequently guilty of theft; for there is no theft in disposing of property, not knowing it to belong to another.

Shall the king pay interest or not? He shall not pay interest; the text of SAMVERTA (Book I, v. 72) forbidding interest on a sum which was not originally known to be due.

It must be noticed, that a specifick time is appointed by Sages for the custody of stock by the king; but no specified period being appointed for the custody of it by a partner or a stranger, the principal stock would be annihilated if such person were entitled to a tenth part of it for every moment of its custody: therefore one-tenth part of it shall be received for the custody of the stock until it be sold; but if it be abandoned in the interval, wages only shall be received. If it happen that the goods are sold the next day after they were bought, a tenth part shall be received even for one day's custody; and the same allowance must necessarily be admitted, even for one year's custody, if the sale be made at that interval of time; for no specifick period having been appointed for custody, a share cannot be allowed on that account. Custody by the king has been ordained, not the transaction of business regarding the stock; but if the business be transacted by the king's own choice, through the channel of his officers, he shall receive a greater proportion of the stock.

* Pronounced *Rár;* the region west of the *Bhágirat'hí* river.

SECT II.—*On Partnership among Priests jointly officiating at holy Rites.*

28.

NÁREDA:—Should a priest officiating at holy rites be disabled, let another in like manner perform his work, and receive from him the stipulated share of the gratuity.

"Disabled;" the term is so explained in the *Retnácara* and *Vivâda-Chintâmeni*. The expression "in like manner," extends the law of commerce to this case: but in commerce, if one partner be disabled, his work shall be performed by another; and RAGHUNANDANA, in the *Malamása tatwa*, admits the extention of the law for secondary cases to the primary or principal case. In the former text (18) the same word signifies "disabled;" and the sequel expresses, that "the heir shall undertake the work." The exposition therefore appears accurate.

"Another;" his son or other heir; on failure of an heir, a partner able to perform the work; or if there be none such, a stranger. This must be understood, as it has been already declared *in the preceding section:* but the substitute does not receive wages as in commerce, for he would be a hireling if he received wages generally; and a reward equal to a tenth part is not proper in this case. Thus a priest, engaged in a sacrifice, falls sick after the first day; afterwards, a substitute performs his work during ten days; if the substitute received a tenth part, and the priest first engaged received the whole of the residue, their rewards would be very disproportionate: but in commerce there is no such disproportion, for the substitute is paid by the trader out of his own stock. On this consideration the Sage propounds the reward: "and receive from him, &c.;" meaning, that the law of commerce is not extended to this part of the case.

"Stipulated;" what has been stipulated by the substitute for the performance of the work, and has been promised by the priest who was first engaged.

29.

VRĬHASPATI:—So, if one of several persons, jointly engaged in *sacrificing or other* work, should be disabled from acting in it, let his part of it be performed by a kinsman, or by all the other associates.

"Work;" sacrifice or the like. The *Retnácara*.

MISRA inserts this text with an observation, that "VRĬHASPATI declares the law generally." It is inserted by both, under the title of Priests officiating at holy rites: the inference will be mentioned.

So, if one of several persons jointly engaged in commerce or other business by a man disqualified through incapacity or otherwise, should be disabled from acting in it, his part of it should be performed by a kinsman; or, on failure of a kinsman, by all the other associates. Such is the meaning of the text.

It may be so in commercial cases; but how should that be done in the instance of a sacrifice? for, a sacrifice being performed for the benefit to

accrue therefrom, it is contrary to rule that the work of one should be performed by another; and two such rites cannot be performed at once by the same person, since it is forbidden to perform at once two rites of a different nature. The answer is, it may be performed according to the distinctions of sacrifice: if a hundred thousand sacrifices be undertaken, five or six persons being engaged to officiate as *Hótá*, or reader of the *Rĭgvéda*, should one be disabled, his part of the work may be performed by the others; and all admit that the *Hótá* may officiate as *Brahmá*, or superintending priest.

If this text, expressing work generally, be considered by MISRA as relating to all cases, whether commercial or otherwise, why has it not been inserted in the first section on Partnership among Traders? The answer is, it is inserted here to show that such a rule exists in regard to partnership among priests officiating at holy rites. It should not be objected, that this text relates to commerce only, because it coincides with the text of NÁREDA on the subject of commerce (18). Its application to holy rites, deduced from the comprehensiveness of the expression, cannot be abandoned; and all difficulties are removed by admitting this rule in partnership among officiating priests. SANC'HA and LIC'HITA concur also in directing the substitution of a kinsman.

30.

SANC'HA and LIC'HITA:—If an officiating priest die before the sacrifice be completed, his kinsman sprung from the same original stock, or his pupil, shall complete his part of the work; but if he have no kinsman, let another priest be engaged.

It is implied, that his kinsman, or pupil, should complete his part of the work as a favour conferred on him: if they do not perform it, another person must be sought. The next in succession need not be selected, as in cases of inheritance; for the same rule *of substitution* is applied by VRĬHASPATI to the other associates, and the law is the same in commercial cases. But if they require a share of the gratuity, it must of course be given.

Is not the text superfluous; for, the general law acquires that, if the father be disabled, the son must perform what should have been done by him? No: for, should the sacrificer say, "this man has fallen sick, I appoint another to perform his part of the work, his son shall not perform it;" the text would serve to prevent such conduct. It therefore appears, that, if a priest engaged to officiate at solemn rites be disabled, the substitute should be appointed by him. The priest being bound to perform the rites by an engagement in this form, "I will act according to the best of my knowledge;" should he be disabled, it is proper that he should provide the substitute; otherwise he would be guilty of a moral offence, not effecting the work he had engaged to perform: and it must be understood that the form of appointment is this: "I engage you to perform such a work undertaken by me."

31.

YÁJNYAWALCYA:—A man of crooked ways let the other partners expel without profit; and let a partner unable to act appoint another man to act for him: this law is declared for partnership among priests who jointly officiate at holy rites, and among husbandmen or artificers.

This shows, that the person unable to act should make the appointment: in commerce, the substitute should be chosen by him, not by the other partner; and that law being extended to partnership among priests by the terms of the text, it appears that the person who is unable to act should appoint the substitute.

VÁCHESPATI BHATTÁCHÁRYA holds, that another priest should be engaged by the sacrificer, if the priest first engaged be defiled; for his defilement disqualifies him for appointing a substitute. Even in other similar cases, another priest should be appointed by the sacrificer. But it is not incongruous to say, that another priest should be appointed with the approbation of the priest first engaged.

If the son or pupil of the person who is unable to act be not equally skilled with the father in performing the rites undertaken, the sacrificer may reject him: such is the induction of common sense. But if the person appointed by the officiating priest be equally capable with himself, he should not be rejected: or if the sacrificer cannot produce a person superior to him who was selected by the officiating priest, then also the person engaged by the officiating priest shall perform the work: or should the officiating priest provide a substitute equal to himself, and the sacrificer provide one superior to him, even then the person provided by the officiating priest shall perform the work; for it is not proper that the sacrificer should now require a person of superior qualifications. In the same mode, further rules may be established.

32.

MENU:—If an officiating priest, actually engaged in a sacrifice, abandon his work, a share only in proportion to his work done shall be given to him, by his partners in the business, *out of their common pay*.

If he abandon his work, by reason of sickness or the like, a share of the sacrificial fee shall be given to him in proportion to his work done.

The *Retnácara*.

So likewise VÁCHESPATI and CULLÚCABHATTA. But if he wickedly abandon his work, a distinction is taken, which will be mentioned.

33.

MENU:—But if he discontinue his work *without fraud*, after the time of giving the sacrificial fees, he may take his full share, and cause what remains to be performed by another priest.

In sacrifices and other holy rites celebrated according to the forms of MADHYANDINA, the fees are directed to be paid in the middle of the ceremony. In such a case, if an officiating priest be disabled after the payment of the fees, he may take his full share, and cause the work to be completed by another. Such is the exposition of CULLÚCABHATTA; but MISRA, giving the same exposition, explains "another priest," a son, &c.: this, however, may be understood as also intended by CULLÚCABHATTA.

"His full share;" his share on a partition with the other officiating priests. If there be no son, what shall be done? It should not be said that causing the work to be performed by another, the disabled priest should give him wages: or if he perform it as a favour, there is no objection to the omission of wages: but the expression "he may take his full share,"

supposes the work to be completed by his own son. Were it so, the text would be superfluous. Nor should it be said that the text intimates this distinction; if the disability arise before the fees are paid, the sacrificer should engage another priest, and, dividing the gratuity, pay a share to each; but if the fees have been paid, the priest who has received his fee may appoint another selected by himself. There is no ground for a distinct preferable right of the officiating priest and sacrificer, to appoint the substitute before, or after, the payment of the fee. Until the sacrifice be completed, there is apprehension of failure in the ceremony; else what remain, need not be performed.

To this question some reply, the fee received by the officiating priest becomes his absolute property. How should the substitute, afterwards completing the work, be entitled to receive a share of it from him; for the sacrificer's act of religion would be impaired, if he gratified one priest out of the property of another? Therefore should a person different from the son or other heir complete the work, he is entitled to receive some additional recompense from the sacrificer. The fee for a specifick part of the ceremony having been already paid, how should a gratuity be afterwards payable to the substitute, since it is not ordained by the law? This objection is wrong; for the general law shows that fees should be paid by way of recompense.

34.

Purána:—The man who obtains, by false pretences, a *Bráhmana's* recital *of holy texts*, or pays not the due reward, will certainly go to a region of torment.

This is moral law, not the law of judicial procedure; consequently, should the sacrificer defy hell, whence shall the substitute who completes the work obtain his wages? Labour unrewarded is not consistent with judicial law. Should he not therefore receive a recompense from the officiating priest? and even though a gratuity be given to him by the sacrificer, shall he not receive a share of the fee from the officiating priest? Since MENU directs that the priest first engaged may take his full share, a fee by way of recompense from the employer, being required by moral law, should also be established as requisite under the law of judicial procedure; for the text intends it. But when a son is the substitute, he is sufficiently recompensed by the gratuity paid to the father; consequently there is no difficulty, even though another fee be not paid.

The substitute should be appointed by the officiating priest, even in this case (namely, where the fees have been already paid); for he has agreed to perform the work: but if the priest, not afraid of violating his engagement, refuse to appoint another person, let the sacrificer engage another priest, that his business may be effected; whether it be a sacrifice according to the forms of MADHYANDINA, or other solemn rites, such as the *jyótishtóma* and the like. In this case, if the fee have not been already paid, the share should be subdivided; but if it have been paid, it is obvious *that the full share shall be retained, and a separate recompense be given to the substitute.*

It should not be argued, that the act is perfect at the moment when the sacrificer has engaged the priests. As hunger is not satisfied before victuals are prepared, merely by commencing their preparation; so the benefit of solemn rites, yet unperformed, is not secured by the mere undertaking.

Payment of fees in the middle of the ceremony is now practised, in conformity with the opinion of RAGHUNANDANA, at the *Durgápújá*, and other festivals: the same form should be there observed in regard to the appointment of priests; for the reason of the law is equally applicable.

MENU himself propounds the shares in particular sacrifices, as an example of the distribution of fees, to which the expression "his full share" alludes.

35.

MENU:—Where, on the performance of solemn rites, a specifick fee is ordained for each part of them, shall he alone who performs that part receive the fee, or shall all the priests take the perquisites jointly?

2. *At some holy rites*, let the *Adhwaryu*, or reader of the *Yajurvéda*, take the car, and the *Brahmá*, or superintending priest, the *fleet* horse; let the *Hótá*, or reader of the *Rigvéda*, take the *other* horse, and the *Udgátá*, or chanter of the *Samávéda*, receive the carriage, in which the purchased materials of the sacrifice had been brought.

3. *A hundred cows being distributable among sixteen priests*, the four chief, *or first set*, are entitled to *near* half, *or forty-eight*; the next four, to half of that number; the third set, to a third part of it; and the fourth set, to a quarter.

At those solemn rites, in which specifick fees are ordained to be paid for each part of them at the commencement and so forth, shall he alone, for whom the fee is paid, take it; or shall he receive a deduction only, and all the priests take and divide the perquisites? On this doubt, the legislator propounds this text (35, 1). CULLÚCABHATTA.

"He alone who performs that part shall receive the fee;" where specifick fees are ordained by law for each part of the rites, payable to the persons officiating as *Brahmá* and so forth, they shall receive those several gratuities, whatever be the amount; and not throw the fees together, and divide the whole. The import of the subsequent phrase, "take the perquisites jointly," will be explained hereafter. How much shall be the fee, for whom, and at what sacrifice? To illustrate this, he himself instances one case: on preparing the sacrificial fire for those who follow certain *śác'hás* of the *Véda*, a car should be given to the *Adhwaryu*; a fleet horse to the *Brahmá*; and the carriage in which the moon-plant was brought to the *Udgátá*: therefore, lest the *perspicuity of the* rule be obscured, whatever fee is directed on whatever account, *that, and* no other, shall be paid. So CULLÚCABHATTA.

"Those who follow certain *śác'hás* of the *Véda*;" those who study certain *śác'hás* of the *Véda*. "On preparing the sacrificial fire;" on preparing it for oblations to fire.

The *Adhwaryu* and the rest are distinct officiating priests, whose duties are well known. The *Brahmá* and others shall not have a share of the car; nor the *Adhwaryu* and the rest, a share in *the value of* the *Brahmá's* horse. CULLÚCABHATTA mentions a *fleet* horse, to show the relative inferiority of these priests in the order in which they are mentioned. If there be no

specifick fee for each part of the rites, a partition shall be made as suggested by the text, "all the priests *shall* take the perquisites jointly." He states a case as an instance of partition: where four sets of priests officiate, the second set is entitled to half of what is receivable by the chief set, and so forth. The third set is entitled to a third of what is receivable by the first set, not to a third of the whole; for the first and second set having received three-fourths, a third of the whole cannot be paid out of a quarter only. Therefore the text must be understood to mean a third of what is receivable by the first set: hence it amounts to something more than half a quarter added to a quarter of this fraction; and more than three quarters added to half a quarter of the whole sum have been distributed: a trifle remains, somewhat less than half a quarter; but the fourth set ought to receive a quarter of half the sum, or a quarter of the share receivable by the chief set; that is, half a quarter of the whole: yet there remains not so much. This difficulty is reconciled by CULLÚCABHATTA, CHANDÉSWARA, VÁCHESPATI, MISRA and others. The word *arddha* in the masculine gender is employed in the sense of a part in general, whether more or less *than half*, as noticed by AMERA; from the context, it must of course signify something less than half; and it signifies a part *nearly* equal *to half*, for it is a rule, that equal parts are understood when the proportion is not specified; thus they reconcile the distribution. At the *jyótishtóma*, sixteen officiating priests are required by the law: there the *Hótá*, *Adhwaryu*, *Brahmá* and *Udgátá*, are the four chief persons, *or first set*, entitled to half the fee; and the fee, directed by holy writ, consists of a hundred cows: an equal part would amount to fifty; something less than that, or forty-eight cows, shall be received by the *Adhwaryu* and the rest. The next, namely, the *Maitrávaruni Prestótá*, *Bráhmenáchch'hansi*, and *Pretiprestóta*, who are entitled to half of what is received by the first set, according to all readings of the text, (which differ in form, not in substance,*) shall receive twenty-four cows; the difficulty being here reconciled by allotting something less *than a quarter*. The third set, consisting of the *Achch'háváca*, *Néshtá*, *Agníd'hra*, and *Pretihertá*, shares a third part of what is receivable by the first set, or sixteen cows; and eighty-eight cows have been thus distributed: the fourth set, consisting of the *Gráva*, *Unnéta*, *Pótá*, and *Swabráhmanya*, shares a quarter of what was receivable by the chief set, or twelve cows: thus the hundred cows are distributed. The same form is to be understood in all cases.

Adhwaryu, &c. are sixteen denominations of persons engaged for the several parts of the solemn rites of sacrifice and so forth, explained in the law concerning religious ceremonies. Disputes among them occur at the time of appointment, not at the time of distributing the fees; for the law has obviated disputes concerning the distribution. Each should be appointed to that part of the ceremony for which he is qualified; or he may be admitted, through favour, to an office for which he is less fit.

The distribution of cows at the *jyótishtóma*, as mentioned by CULLÚCABHATTA and others, is not merely grounded on the reason of the law; but the law itself ordains such a distribution.

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* *Tad arddha bhájah;* entitled to half of that number; to half of that half, a phrase similar to that of "skreened by a skreen." MISRA reads *tad arddhinah;* and notices another reading *dwitiyinah:* the last is, however, pertinent, for the term may well signify entitled to one part in two. The first reading is approved by CHANDÉSWARA and CULLÚCABHATTA. [*I have transferred these remarks from the text to a note, for the sake of avoiding too long an interruption of the sentence.*]

36.

SRAUTA CÁTYÁYANA:—Twelve to each of the first set, six to each of the second, four to each of the third, and three to each of the last.

This supposes four priests in each set. It must be noticed, that if priests be engaged for the first and second sets, and the others be personated by grass,* the whole fee should be divided into three parts, of which two should be given to the chief set, and one to the second: for the law shows, that the second set should have half the quantity received by the first. So, if the first and third sets only join in the work, the fee should be divided into four parts; of which three should be given to the first set, and one to the third: or, if the concert be only between the first and fourth sets, the fee should be divided into five parts, of which four should be given to the first, and one to the fourth set: if the second and third sets only unite in performing the rites, the fee should be divided into five parts; of which three should be given to the second set, and two the third. If the second and fourth sets only officiate, the distribution is the same which is made when the first and second only act. If the third and fourth sets only officiate in the joint work, the fee should be divided into seven parts; of which four should be given to the third set, and three to the fourth: so if the first, second, and third sets act together, the fee should be divided into eleven parts; of which six belong to the first set, three to the second, and two to the third: if the first, third, and fourth sets only officiate together, the fee should be divided into nineteen parts; of which twelve belong to the first set, fourth to the third, and three to the second: if the first, second, and fourth sets only act together, twenty-eight shares should be distributed; of which sixteen to the first set, eight to the second, and four to the fourth: but if the second, third, and fourth sets only act together, thirteen shares should be distributed; of which six should be allotted to the second set, four to the third, and three to the fourth. If one priest only be engaged for any one of the sets, and the others of that set be personated by grass, but a competent number of priests be engaged for the other sets, then, whoever performs the work of a priest personated by grass shall receive his share. This rule must be admitted in regard to all the sets; and the same method is applicable to other sacrifices. In fact, at this time, and in this province, the employment of sixteen officiating priests is little practised; but the employment of four, as directed in the *Grihay-sangraha*, is frequent.

37.

The Grihya-sangraha:—In gaming, in judicature, in holy fasts and solemn rites, a stranger sees what escapes the observation of the principal: therefore

2. Let one be appointed to perform the work; let another hold the book; let a third expound questions; and thus let the business be conducted.

The first text declares the motive; in the second verse strangers are distinguished: "let one be engaged in the work," namely, the spiritual

* When a religious ceremony is performed by a single priest, he places on his right hand fifteen blades of *cus'a* grass, to personate the superintending priest: and at rites, which should be performed by four or by sixteen priests, the representatives of some of them are similarly made of grass if the number of persons attending be insufficient.

teacher; and he officiates as *Brahmá*, or *superintending priest*, at the performance of sacrifice as a part of a solemn act of devotion. If the principal himself do not perform the sacrifice, the spiritual preceptor officiates as *Hótá, presenting the oblations*; and if the man himself do not perform the principal rite, he officiates as his substitute. One person holds the book: and a by-stander expounds questions.

By "strangers" are denoted persons who attend for any purpose at gaming and so forth; but in the performance of a sacrifice, since a text ordains that persons should be engaged for every part of the business, their appointment by name to particular offices must be understood. Herein RAGHUNANDANA concurs; and the learned say, that a previous appointment made with civility must be understood. Consequently, if it be supposed that it is solely meant to instance persons engaged *for the performance of rites*, that is applicable to those only who are enumerated. Therefore, they are thus counted; first, the person engaged for the ceremony, namely, the *Brahmá*, for he is appointed to check the utterance of words unsuitable to the rites, and to notice what is done, and what is omitted. If the man cannot perform the sacrifice himself, then the *Hótá* is also a person engaged for the ceremony; for he is employed to recite texts, and to offer the clarified butter. Both, being persons engaged in the work, are comprehended in the same term. A substitute is of two sorts, the *Hótá* and another person; we have therefore said briefly, that both are apprehended in the same term, and that the employment of four officiating priests is proper. In fact, the *Brahmá* or *superintending priest* should be considered as a stranger engaged in the work; for the *Hótá* and substitute cannot give more attention than the principal. Thus the *Brahmá* notices what is done, and what is omitted; a by-stander notes the form; and the reader views the book, for the *Hótá* cannot attend both to the book and the oblations; though, as representative of the person for whom the ceremony is performed, he should be considered at the principal *in the rites*.

Is not the reader also appointed for the rites? The term "appointed for the rites" must be understood as intending a person different from the reader, in like manner as one name of kine may denote cattle of that sort, and synonymous term in the same sentence may intend cows only. Or the *Brahmá* is useful *and necessary* to preserve *due obedience to* the commands of the *Védas*, that the rites may have their effect, as a pestle *is necessary*, to pound rice and other grain; but the reader is only employed, on the reason of the law, to hold the book. If a priest is not found for the employment, the *Brahmá* may be personated by grass; but if the principal himself can remember the texts, the reader is not personated by grass. Thus "appointed for the ceremony," signifies a person employed as requisite to the effect of the rites.

"Let a third expound questions:" for example, when the *Hótá* attends not, it is asked, "what is the consequence when the *Hótá* does not attend?" Or, after the sacrifice is begun, the reader says, "resting your hands on the ground, name the Earth inaudibly." On hearing this direction, the *Hótá* placing his hands on the ground, asks, "in this manner?" The by-stander *replies;* "even so," or, "not so." Such answer is the business of the by-stander, explained by AMERA, "he who shows the forms." Let the *Brahmá* superintend the rites, noticing whether the *Hótá*, through forgetfulness, do anything contrary to proper form. Thus are four officiating priests employed. When the work is finished, gifts shall be received by them

from the person for whom the sacrifice is performed; and those gifts are called sacrificial fees *(dacshiná)*, because of ability *(dacshatwa)* to produce effect.

By whom shall the fee be received; by one person? or jointly by all? On this doubt it is directed, under the text of MENU (36), that the specifick fee shall be received by him for whom it is ordained; but where no specifick fee is ordained, it shall be shared among all the priests. With this the *Ch'handóga pariśishta* disagrees; for it excludes the reader and the by-stander, directing the fees to be divided between the superintending priest and the person who presents the oblations.

38.

The *Ch'handóga-pariśishta*:—The reward which has been ordained for him shall be given to the *Brahmá,* or *superintending priest,* when the business is completed; and where no reward is declared, let a *vessel full of grain* or *púrna pátra* be given.

2. If another perform the office of sacrificer, he shall take half the sacrificial fee; but if the principal himself perform both offices, he shall give the fee to another person.

It cannot be argued, that, *Brahmá* being explained by RAGHUNANDANA, in the *Durgótsava tatwa,* as bearing the general sense of a person who causes the rites to be performed, the reader is entitled to a share of the sacrificial fee; and, by a parity of reasoning, the same follows in respect of the by-stander also. In the expression, "if the principal himself perform both offices," "both," referring to what has proceeded, shows, that in the case of his performing both the office of *Brahmá* and *Hótá,* the fee should be given to another person; and that argument would be inconsistent with what is written in the *Sanscára tatwa,* "let him give the fee for the principal rite to the teacher who superintends the rite; but if the *Hótá* be a different person from the sacrificer, no specifick fee being mentioned for their separate offices, the *Brahmá* and *Hótá* shall share the sacrificial fee.

Some hold RAGHUNANDANA's meaning to be this: let all the priests share the perquisites, under the text of MENU 35, 1); but the text quoted (38, 1) is a general direction, which supposes a case where no reader is employed; for the difficulty is removed by interpreting "another person" (38, 2), another teacher by book: and this supposes a case where the sacrifice is the principal rite; but if it be a secondary part of the rites only, the *Brahmá* and the rest not being employed in the principal ceremony, the fee for that ceremony shall be received by the reader, who is employed in it. Shall not the reader, being employed even in the sacrifice, receive a share of the sacrificial fee? And, if this be admitted, is it not inconsistent with the rule, that "the *Brahmá* and *Hótá* shall share the sacrificial fee? *The answer is,* where the sacrifice is only a part of the ceremony, the reader not being excluded from the perquisites of the principal rite, the fee for that sacrifice, which is only a part of the ceremony, shall be received by the *Brahmá* and others employed in that alone: and here the reason of the law shows, that he only who is appointed to perform a specifick work, shall receive the specifick fee ordained for that work. If he do not cause that specifick rite to be performed, still may it not be said, that there is no obstacle to his receipt of the perquisite, making it a rule that he

who causes the principal work to be performed causes the part to be performed, as it is a rule that he who performs the principal work performs the part? *This question is thus answered*, let him receive a share of the sacrificial fee; but, in the principal rite, let the substitute and the *Hótá* receive a share of the gratuity allotted for that rite. The expression "the *Brahmá* and *Hótá* shall share the fee," is intended generally. Under the direction for a specifick fee to the *Brahmá*, sacrificial fee is shared by all the priests. To remove the inconsistency with the *Ch'handóga-pariśishta*, may not the text of MENU be limited to the *jyótishtóma* and similar sacrifices? No; for MENU is declared pre-eminent by VRĬHASPATI, (Book V, v. 333), and it is regular to explain the texts of other Sages according to that law. How shall the partition be made in this case? Not in the form directed by the text above cited, "the four chiefs are entitled to half, &c." (35, 3); for no mention is made, in this case, of chief, secondary, and subordinate priests. Let it not be objected, that such mention is made in the text last cited, "let one be engaged in the work, &c." (37, 2); for there is no difficulty in considering that text as merely intended for elucidation. To this it is answered, the numbers stated for the purpose of elucidation must be considered as satisfying that question: and there, the superintending priest and the person who presents oblations are first; for they are substitutes for the principal, and are together mentioned by RAGHUNANDANA as first. Thus the reader is entitled to half, and the by-stander to a third, of what is receivable by the superintending priest, and by the *Hótá*. Consequently the superintending priest and the *Hótá* shall each receive three shares, and the reader a share and a half, of the whole fee divided into eight shares and a half; the two chief priests receive equal shares, but the by-stander receives one share only: however, should there be several by-standers engaged to attend the rites, the sacrificer should himself pay a gratuity to the others; for the text mentions one by-stander only, "let a third expound questions" (37, 2).

Others again hold that the words of MENU, "all the priests take the perquisites jointly," relate to rites which must be performed by four priests; for that is suggested by the subsequent text concerning solemn rites, where the plural number is used (35, 3). But the text of the *Ch'handóga-pariśishta* relates to solemn rites performed solely by the *Brahmá* or the like; and RAGHUNANDANA says, "it intends generally the person who causes the rites to be performed," meaning rites different from sacrifice; for, even in that case the payment of fees being necessary, that is set forth in the expression "when the business is completed."

It must be considered, that the words of MENU, "all the priests share the perquisites," show a partition of perquisites in all rites, since no distinction is mentioned: and, by the mention of the chief *or first set*, partition of the perquisite is shown in solemn rites performed by sixteen priests. The word *Brahmá* being employed in the text above cited (38), he only receives his fee when the sacrifice is completed: and by parity of reasoning, the same rule will have force in other cases. There is no authority for limiting the sense of the word *Brahmá*: but if it be taken absolutely, why may not he who causes the rites to be performed receive a share of the perquisites? It is fit that all the priests employed in the sacrifice should receive a share of the perquisites according to their employments.

Some remark on the text, "let him deliver the sacrifick shed, and the furniture of it, to the officiating priest," that even the furniture of the shed

must be divided. But there is no proof from any positive ordinance, or from settled usage, that he who causes gifts to be made, has a title in all the chattels given at a distribution of alms. It is the current practice, for the sacrificer to give separate gratuities to the superintending priest, to the reader, and the rest. The sense of the text quoted (38, 1) is this: whatever reward on whatever occasion is *so* ordained by the law, (at some holy rites a cow, on another occasion cloth, or other rites gold, and so forth ;) that reward shall be given when the work is completed : and it is applicable to other rites, besides a sacrifice performed according to the forms of MADHYANDINÁ and the like ; for there it is directed that the fee shall be paid in the midst of the solemnity : this is intimated by the expression "*on whatever occasion.*" The specifick fee is not mentioned, but a reward shall be given in the form of a *púrna pátra* or the like.

39.

The Grĭhya-sangraha and *Pariśishta pracása* define a *púrna pátra* :—Eight handfuls are a *cunchi* : eight *cunchis*, a *pushcala* ; and four *pushcala*, a *púrna pátra.*

Lawyers say, that a *cunchi* is a quantity of rice sufficient for one meal. If the party be unable to give the *púrna pátra* mentioned, then the *Ch'handóga-pariśishta* directs :

40.

Let him make a *púrna pátra* of so much rice as will satisfy one great eater, and no less: this is a settled rule.

"If another perform, &c." (38, 2): it must be understood, from parity of reasoning, that, if there be others, a reader and a by-stander, even they shall partake of the fee. If the principal himself perform the offices both of *Brahmá* and *Hótá*, let him give the fee to another person, to the reader and by-stander. Or, if he perform both his own office and that of a stranger, let him give the fee to another person, that is, to any *Brahmána* ; otherwise the rites would be imperfect.

41.

SANC'HA and LIC'HITA :—If an officiating priest die, *or absent himself*, let the sacrificer afterwards engage another priest : the sacrificial fee belongs to the priest first engaged, *or to his heir* ; but he who is afterwards called shall receive something. Should he absent himself, giving notice of the *probable* time, and of the cause *of his absence,* let the sacrificer wait that time, and not perform the ceremony with another priest : but if he be hurried, he may cause that sacrifice to be finished by another ; and the absent priest, who is forsaken, shall receive some trifle *as a token of respect.* Should the officiating priest wilfully absent himself, though forbidden, while the ceremony is incomplete, he shall be fined a hundred *panás* : or if he be a grievous offender, the family-priest *shall be amerced.* To priests engaged to officiate at solemn rites, but afterwards found

to be afflicted by disease, degraded, insane, of ill-fame, or disabled by age, favour should be shown; *but other priests should be appointed in their stead.* If the officiating priest wilfully desert the sacrificer, who is not a degraded person, *nor otherwise disqualified,* he shall incur an amercement of two hundred *panás:* and so shall the sacrificer, who forsakes the officiating priest, though he be not degraded, *nor otherwise incapable of acting.* But a man should readily forsake an ignorant *or foolish* priest, though he be not degraded; and a priest may abandon a sacrificer who gives not *due rewards,* even though *otherwise* void of offence.

It has been already said, that if the officiating priest be disabled, his work should be finished by another person: the Sage now declares the rule, when a priest engaged to officiate does not attend, "let the sacrificer afterwards engage another priest." If he be accidentally delayed in coming from his house, or if the sacrificer should hear that the priest has gone to a another town without giving notice that a delay in his attendance may be expected, then another priest may be appointed. But CHANDÉSWARA explains the text, "If one of several priests appointed to officiate at solemn rites should die or be disabled, and the sacrificer engage another priest." This (*absence*) must also be understood from the terms of the gloss, "die, or be disabled." MISRA says, "if one of the officiating priests die, let the sacrificer engage another priest:" and the meaning is, "if the priest first appointed go to another town, or die, the fee belongs to him, though another priest be engaged; and the other priest, considered as a stranger, shall receive some recompense in proportion to the work." This appears from the literal sense of the Sage's text, and from the explanation given by MISRA and others. What recompense shall he receive? a share of the sacrificial fee? or another gift from the sacrificer? if he receive a share of the sacrificial *in proportion to the work,* then should the priest, after being engaged for the rites, absent himself on the first day, he would have no share of the sacrificial fee. Under the exposition of CHANDÉSWARA, ("the fee payable to the person first called shall be proportioned to the work, and be received by his heirs in the case of his death,") it is said that a fee proportioned to the work shall be received by the person first called, or by his heir. Why is it declared that "the sacrificial fee belongs to the priest first engaged?" Should it not rather be declared, as in the text of NÁREDA (28), that "he shall receive a share of the gratuity?" This text has the same import with the words of NÁREDA: the former text of SANC'HA and LIC'HITA (30), directing the appointment of another priest, intimates a partition of the sacrificial fee: by mentioning, in the present text, that the gratuity belongs to the priest first appointed, it is denoted, that if the first priest return after another priest has been engaged, the first priest shall perform the work: on this consideration, it is directed that the other priest shall receive something. If the former text (30) relate to the death of the priest, how can this part of the present text (41) apply to the case of absence; and why has CHANDÉSWARA explained it "if he die, &c.?" "Die," in the former text (30), may be taken in an indefinite sense. Then, the text of NÁREDA coinciding with that of SANC'HA and LIC'HITA, the word explained "disabled" would signify dead? Some rule is necessary for the case of a priest unable to act: the text of NÁREDA cannot apply to a

case of death; for he says, "receive from him (from the first priest) the stipulated share."

This first rule being applicable to the case of absence without notice, the Sage delivers a second rule: "If he absent himself, after notifying the time, (a month, a fortnight, or the like,) or the cause of his absence, let the sacrificer wait his return, and not perform the ceremony with another priest:" so the *Retnácara*. A priest engaged for a sacrifice which may be performed on many *different* days, or for the reading of *Puránas* or the like, being busied on work which allows not leisure, fixes a day, two days, a fortnight, or a month; and, promising to attend after finishing the work, departs on that business: the sacrificer, having consented *to wait*, must not engage another priest, but must defer his business for the time *limited*. But MISRA thus expounds the text: "if any officiating priest be absent on account of business, let the sacrificer allow sufficient time *for his return*." According to his gloss and reading, the sacrificer, estimating the time and occasion *of his absence*, should so long await *his return*. The meaning is, that, estimating the time required for the completion of that business which occasions his absence, the sacrificer should wait a little longer. On this opinion, absence, with the consent of the sacrificer, is not implied; and this part of the text has the same sense with the preceding part: but there, the fee is noticed; and here, it is directed that another priest shall not be appointed. The result is, that, in case of consent, it is necessary to wait a sufficient time, as is universally acknowledged; and even without having previously consented, the sacrificer should, if possible, wait the priest's return. According to MISRA, this is ordained by the law; and according to the *Retnácara*, it is *only* grounded on the reason of the law: but it is proper.

If a priest, after being engaged for a sacrifice, which allows not leisure, but should be performed on the day of full or new moon, or the like, absent himself on some urgent occasion, with, or without the assent of the sacrificer, what is to be done? for the sacrificer cannot wait, since the rites are only proper on a certain lunar day? To this question it is answered, "if he be hurried, &c." (41). "And the absent priest shall receive some trifle;" he shall receive something as a token of respect; since, not having performed any part of the work, he is not entitled to a share of the sacrificial fee. Or something shall be given to preserve due respect, merely on acount of his engagement, when the priest, prevented by business from attending *at the proper time*, afterwards does attend: this also should be understood from parity of reasoning. CHANDÉSWARA thus explains the text: "let a man who understands the order of proceeding, cause the sacrificer to be finished by another priest; and let the priest first engaged, who went to a distant place, and has been *therefore* forsaken, receive something from the sacrificer as a gratification:" that is, if the sacrificer could not wait his return. But MISRA says, if the priest be supposed to have died, &c. let the sacrificer cause the ceremony to be finished by another priest, and the sacrificial fee belongs to him; but if the priest happen to return, let the sacrificer give him some trifle. If the priest went with the assent of the sacrificer for five days, and afterwards another priest, knowing that rites are to be celebrated at the expiration of ten days, happen to attend, the sacrificer may cause the work to be finished by that other priest: but, after his own assent, he should not, without a sufficient cause, engage another priest, at the instigation of *other* people, or from a motive of anger or the like.

A third rule is mentioned: "if the priest wilfully absent himself, though forbidden by the sacrificer, he shall be fined a hundred *panás:* so MISRA and CHANDÉSWARA. From the insertion of two words, "wilfully" and "forbidden," it is inferred, that, if he be absent on account of urgent business, even though forbidden, he shall not be amerced: nor shall he be fined if he absent himself, even without business, but not forbidden *by the sacrificer.* However, "not forbidden" may be understood as included in forbidden: thus, if he absent himself without giving notice to the sacrificer, and without business requiring his absence, even then he may be amerced. This is consistent with the reason of the law; for, as not forbidding is assenting, so it may be said that not assenting is forbidding. It follows from the context, that another priest may be engaged; and the sacrificial fee shall be received by him who performs the work, and it is not proper that a gratification should be given. If the officiating priest, though forbidden, absent himself after performing some work, shall he, or shall he not, receive the fee for that work? It is answered, the payment of a fine is declared, not the forfeiture of the wages of his labour: therefore he shall receive the fee for the work performed. If he only absent himself after his engagement; does he not receive a gratification from the sacrificer? There is no need of a gratification, since he is faulty. The appointment of priests is an essential part of the rites; but it is the act of the sacrificer: the acceptance of the appointment is no part of the rites. Let it not be objected, that the appointment may perhaps be unaccepted; and, if it be not accepted, the rites produce no benefit to the sacrificer; and thence it follows, that the acceptance of the appointment is a part of the rites. If they be completed, it is useless to admit it as a primary or secondary part: another priest is appointed; and his acceptance must be *supposed.* Absence does not here intend going to another province or another town only; but also going to his own house, and neglecting the performance of the rites: and if a priest engaged in one place, and, having undertaken the business, undertake other work in another place, leaving that business unfinished, it must be understood to be an offence, according to the circumstances of the case.

"Or if he be a grievous offender, &c." if the officiating priest be a grievous offender, &c. "Or" denotes another case. By this part of the text is denoted a man who was already a grievous offender; in the former part is intended an offender on that particular occasion. CHANDÉSWARA says, that one who was already a grievous offender is here intended: and this should be understood as admitted by MISRA. Thus, if that officiating priest, having received an appointment for solemn rites, wilfully absent himself, the sacrificer's family-priest, who selected persons to officiate, shall be amerced. It is the regular business of the family-priest to select officiating priests: or, in his default, a learned friend selects them. This meaning is deduced from the word family used in this place, and from such practice seen in hundreds of instances. But VÁCHESPATI says, "the spiritual preceptor, who invested him with the mark of his class, shall be amerced:" and the author of the *Retnácara* explains the word family in another sense; "the priest, whose business it is to examine the families of the officiating priests, shall be amerced." No *essential* difference results from this exposition; the only difference is, that it has been noticed in the *Retnácara,* that the officiating priest should be selected by the family-priest.

Others thus interpret the text; "the family-priest, officiating at rites, shall be fined a hundred *panás,* if he offend." Consequently the sense is, that, if the family-priest, though forbidden by the sacrificer, wilfully absent

himself while the sacrifice is unfinished, he shall be fined a hundred *panás*. This was *also* directed by the preceding part of the text, but is repeated to show a fine if he absent himself, even though he have not been engaged *for a particular ceremony*. This construction will be noticed in explaining a text which will be quoted from NÁREDA (43): but the former construction is proper, because it is delivered by authors, and is consistent with the reason of the law: therefore, should he appoint a grievous offender, he partakes of the offence. It should not be objected, that, if the offence were not previously known to the family-priest, how can there be a fault on his part? He is faulty, because he did not make particular inquiries: and if priests learned in law be selected by the sacrificer without knowing their defects, even then the family-priest should make enquiries concerning faults, which may obstruct the rites; but if the sacrificer exclude him from that office, he is not in fault.

The word *(upádhyáya)* is explained by MISRA, the appointed spiritual preceptor; AMERA explains it 'a teacher;' he from whom a disciple resorting to him *(upétya)* learns *(adhité)* a science, is a preceptor *(upádhyáya)*; we apply it to any family-priest *(puróhita)*. The grounds of this explanation are the mention of the word family: no person is teacher to a whole race or family; nor is it ordained, or customary, that the teacher should select the officiating priests: but the word *upádhyáya*, in hundreds of instances, signifies *puróhitu*.

"Afflicted by a disease," which obstructs the rites, or prevents their effect. "Of ill-fame;" abandoned on account of some offence charged against him, and the like. "Old;" and therefore unable to act. So CHANDÉSWARA. Therefore, if a priest be engaged, without any knowledge of his malady or other disability, and it be afterwards discovered, let the sacrificer "favour him," and, with his assent, appoint another priest. The sense is the same on the reading of CHANDÉSWARA; "favour should be shown."

The text declares an offence in wilfully deserting a sacrificer: but there is no offence in quitting him for urgent business; and if the sacrificer forsake a priest not diseased, not otherwise disabled, nor absent, he shall be fined two hundred *panás*. "Degraded," &c. comprehends generally diseased, or otherwise disabled. It is proper to forsake persons who maliciously seek to injure the solemnity; or who, always finding fault, endeavour to spread ill-reports; and other persons of similar descriptions.

"Ignorant;" much averse from the study of the *Védas*, and unacquainted with the law concerning the rites at which he is to officiate, and with the rules concerning his part of those rites, and the like. If any covetous *Bráhmana* officiate at sacrifices for men of low and mixed classes, for whom *Bráhmanas* do not usually officiate, the sacrificer, having admitted him, shall not *afterwards* reject him, however ignorant he may be. Or if any learned priest, tainted with a sin committed in a former existence, consent to officiate at a sacrifice for such a person, he should be forsaken *by others*, under the authority of the text, as a foolish man; but since his foolish transgression of duty was on that man's account, he shall not be forsaken by him: but if the foolish man had *already* violated his duty on another occasion, there is no offence in forsaking him. This and other points may be inferred from reasoning.

A priest may abandon a man who gives not "due rewards" at the time of a solemnity undertaken in the previous expectation of reward. In the former part of the text it is said, that an ignorant priest may be forsaken:

it must be understood, that a more learned priest attends; a man should not abandon an ignorant or foolish priest, and engage one more ignorant or foolish. In fact all this supposes knavery *or wickedness* : it is not proper to abandon an ignorant priest, without any misconduct on his part, and without the attendance of a learned priest: knavery must be understood as the ground of punishment.

The amercement of two hundred *panás* directed for the sacrificer who forsakes the officiating priest, and for the officiating priest who forsakes the sacrificer, is inconsistent with a text quoted from MENU in the *Vivád́a Retnácara* and *Vivád́a Chintámèni.*

42.

MENU :—The sacrificer who forsakes the officiating priest, and the officiating priest who abandons the sacrificer, each being able to do his work, and guilty of no grievous offence, must each be fined a hundred *panás.*

MISRA and CHAND́ÉSWARA reconcile the text, by saying, that "there is no inconsistency, *since the fines are regulated* according to the voluntary or compulsory *desertion* by a rich or a poor man." Consequently, a rich man, if the act be voluntary, must be fined two hundred *panás ;* but a poor man, even though the act be spontaneous, shall be fined one hundred *panás* only, because he is unable *to pay a greater fine.* By "poor" is meant 'unable to pay two hundred *panás.*' If he cannot pay a hundred *panás,* what is the consequence? He may be acquitted by the surrender of all his property. Why has MENU mentioned a fine of a hundred *panás ?* Constructively, a greater sin being expiable by the surrender of the whole of a man's property, it is unsuitable to say that a smaller offence is not expiated. Here no favour is shown to the sacerdotal class; for it is a *Bráhmana* that deserts the sacrificer: and it must be so settled from the very relation implied in the desertion of a sacrificer.

Panás, though not specified in the text, are understood, from the necessity of satisfying the question, *of what shall the fine consist ?* Where the number is mentioned instead of the species, *panás* are commonly understood; for many instances of this occur: and that designation, being mentioned in the texts of other Sages, is deduced from the coincidence of the rules. In this instance, the fine directed by SANC'HA and LIC'HITA is explained two hundred *panás ;* and the inconsistency of this text is removed by saying, that the two hundred *panás* abovementioned must be understood of wilful desertion by a wealthy man: but SANC'HA and LIC'HITA *also* direct, that an officiating priest, deserting a sacrificer, shall be fined two hundred *panás.* They direct, that an officiating priest absenting himself, though forbidden by the sacrificer, but without *absolutely* forsaking him, shall be fined a hundred *panás.* But it is consistent with the reason of the law, that the amercement should be fifty *panás* only, if he be poor, and his absence be involuntary. This, however, is not specified by any Sage, nor clearly expressed by any Author.

43.

NÁREDA :—Officiating priests are of three sorts; *the first, an hereditary priest,* honoured by former generations *with the employment of*

officiating priest; the second, appointed by the party himself; *the third,* he who voluntarily officiates on account of previous friendship.

2. The officiating priest who abandons a sacrificer, though he be not a grievous offender, nor otherwise faulty, and the sacrificer who forsakes an officiating priest guilty of no grievous offence, shall each be fined.

3. This is the law for hereditary priests, and for those who are engaged by the party himself: but there is no offence in forsaking a priest, who, *unbidden*, officiates of his own accord.

"Honoured by former men;" honoured as officiating priest by former generations; an hereditary priest. The *Vivāda Retnācara.*

"The second, appointed by the party himself;" one who is appointed, on the occasion of a sacrifice or solemn rite, to perform that *particular* ceremony. "He who voluntarily officiates, &c." YÁJNYADATTA, influenced by friendship or the like, and for the benefit of DÉVADATTA, pays adoration to his household gods; or, at a time when he is impure, performs a sacrifice which should be performed by him; or effects the sacrament of the son of an absent friend, even without his assent, to remove the evil which might arise from its not being effected; it is to be understood of this and other cases. "*Nor otherwise faulty;* this may apply to both: by fault are intended blows, enmity, dishonour, and other faults already mentioned.

Who is an hereditary priest? It should not be said, he whom the grandfather employed, and afterwards the father, and next the man himself. If the grandfather, being rich, employed ten millions of *Bráhmanas,* and the grandson, being poor, cannot employ so many priests, he would incur a fine. Some hold, that "hereditary officiating priest" supposes a specifick appointment in this form: "so long as my descendants and yours exist, shall you and your descendant's sacrifice for me and my posterity." It is the custom, that he whom the father called to all solemn rites, should officiate also for the son; and the agreement abovementioned is not supposed. In fact, the appointment is made by saying, "be my priest (*purôhita*);" which implies a distinction opposed to an appointment in this form, "now accomplish my sacrifice:" and here the word "*purôhita*" signifies a priest employed for a long space of time. We do not determine whether the word "I" intend *the speaker* himself only, or his race generally. If it intend his race generally, there is no dispute; because, when the father has agreed that DÉVADATTA shall sacrifice for his son, the son, forsaking him without a fault on his part, is liable to a fine: and this construction is consistent with the reason of the law. If the word "I" be restricted to the speaker himself, how should the son incur a fine by forsaking the priest? Here proof must be brought from practice. A dispute arising on the subject of desertion by an officiating priest or by a sacrificer, the first says, "I have been priest (*purôhita*) *to the family* for three generations;" *he does* not *say* "an agreement was made by his grandfather for the performance of sacrifice *by me and my heirs,* as long as his race should exist."

Is not such an agreement inferred from the performance of sacrifice for three generations without interruption; and does he not, for that very reason, plead the performance of sacrifice for three generations? No; such an inference cannot hold, since it is not the present practice for any person

to make an agreement in that form. On this subject it is said the usage is ascertained, as implied by this text: thus by saying " be my priest (or *puróhita*)," he is fully appointed to be priest *of the family* for a long space of time; and, whatever be implied, the priest so appointed by the father shall not be forsaken by the son, unless he be guilty of some offence. This, virtually, is the sense *of the text*.

A priest appointed by a man himself is of two sorts; appointed for a long space of time, or appointed for a particular ceremony. The rule varies in respect of these: it is an offence, under any circumstances, to forsake a priest appointed for a long space of time, unless he commit some fault; and it is an offence to forsake a priest appointed for a particular sacrifice, in the midst of that sacrifice.

In the gloss on the text of SANC'HA and LIC'HITA, prefaced by the words "others thus interpret the text,'* it is intimated, that if the family-priest, or a priest appointed to that office by the sacrificer himself, should absent himself, knowing that a sacrifice is to be performed, though not engaged for it in the form directed by the law, he shall be fined; provided no person attends as his representative. From parity of reasoning, the sacrificer should be fined, if he refuse to employ his family-priest above described.

If the sacrifice have been uninterruptedly performed by father and son, as family-priest, without an express appointment in this form, " be my family-priest," what is the consequence? Even in this case, the law concerning hereditary priests is apposite, since such an appointment of father and son is admitted by implication.

If hereditary priesthood be liberally admitted in favour of a priest engaged by the father for a long space of time, may it not be admitted in favour of the son of a priest so engaged by the father? Thus, a dispute arising on the subject of desertion between the grandsons of the sacrificer and of the officiating priest, the grandson of the priest may offer this plea, " his grandfather employed my grandfather in sacrifices, and the office has been uninterruptedly held by us from that period." It may be so: for he will better gain his cause by *proof of the performance of* sacrifice for several generations, than by the same *proof* for one generation only.

Such being the case, where the officiating priest has three sons, and the sacrificers, *or employers*, are three, a partition may take place; for, on this admission, the sacrificers, *or employers*, are similar to property. But if any one sacrificer refuse one of the priest's sons, what is the consequence? It should not be argued, that partition arising from the right of the priest's descendants to *officiate for* the sacrificers, *or employers*, under the authority of law and custom, the sacrificers shall be fined if they refuse their assent to the partition: and in this *last* case all shall be fined, since all are equally in fault. No one has mentioned a fine for parties refusing their assent to a partition. Nor should it be argued, that, since forsaking the son of a family-priest amounts to the forsaking of an hereditary family-priest, the abandoning of the family-priest is a cause of amercement. No Sage or author has said so. To the question thus proposed, the answer is, they must be understood to be indivisable, under the text of VYÁSA (Book V, v. 364); and the rational distribution, mentioned by VRĬHASPATI (Book V, v. 366, 6), supposes the consent of the sacrificers. Thus, if the sacrificers say nothing, they shall not be forcibly taken by one person. In

* See page 54.

fact, a distribution of sacrificers, *or employers*, though not mentioned by authors, may be adjusted by the king, on his own judgment: but a distribution by lots should be preferred.

In certain towns or other places, and for particular rites, the office of priest is hereditary in some families; and partition is there customary, and should be admitted in such instances. It is the hereditary office of some persons to deliver written instructions on the forms of penance and the like; in these instances also partition should be allowed.

*'Agrahárica** priests and others, paying revenue to the king, hereditarily receive *tila* and the like; their right should be admitted on the same construction of law with *the right of* family-priests; or on the king's pleasure. As the king has property in the village, entitling him to receive revenue, so the *'Agrahárica* and others have property entitling them to receive *tila* and the like. May not the king, having property, dispose of it at his pleasure; but can the *'Agrahárica* do so? The king has not power to destroy the village *by oppression;* and his gifts and alienations are not incontestible. It is the same in respect of the *'Agrahárica.* The king may *indeed* take the property of the subject, because he is lord of the land: however, as the king, though he have property in the soil, cannot take its *whole* produce, but has a title in a waif, though it belong to a subject; so he may take the property of subjects, though the *'Agrahárica* and others have *also* a title in it.

If *tila* and the like be taken by the *'Agrahárica* and others in right of a property in the village, the giver would have no benefit from the gift, any more than from the payment of the king's revenue. This is denied; property does not arise in the *tila* from the payment of the king's revenue, but a title to receive the *tila.* Property authorizing alienation at pleasure originates in actual receipt, founded on the title to receive from such peasants, and in actual delivery by the donors. Consequently, there is no difficulty.

It is doubted whether wives and others have a title to this succession, although the partition, founded on the admission of a right vesting in *'Agraháricas* and other officiating priests, ought to be similar to the partition of inheritance *in general.* As the wife's title to succession, on failure of heirs in the male line as far as the great-grandson, will be declared under the head of Inheritance, what should reverse her title *in this instance?* It should not be argued, that the wife can have no right in the village, because, as a woman, she is disqualified for the performance of holy rites, and because the wives of *'Agraháricas* and others are totally incapable of receiving *tila* delivered as a gift to priests. The *tila* may be received, and the rights be performed, through the intervention of a substitute. Let it not be argued, that, were it so, a property in the sacrificial fee and *regular* dues would vest in the substitute. The wife may have the benefit of property acquired by the substitute, as a sacrificer has the benefit of rites perfromed by an officiating priest. However, there is this difference: the sacrificer acquires merit from rites performed by an officiating priest, and none is ever acquired by the intermediate performer of the rites; but if the duty of the officiating priest be performed by a substitute, property in the sacrificial fee is at first vested in the substitute, and, through him, in the widow entitled thereto. It is alleged, that there is no authority for this construction. It cannot, *it is said,* be argued, that the authority which forbids

* Priests who attend at funerals. In some districts they are called *Mahábráhmen;* in others, *Mahápátra, Agradán, Prétiya Cant'aha, &c.*

desertion proves a property in the village, since otherwise it must be irrelevant; hence property in the sacrificial fees and the like vests in the wife as owner, and afterwards is acknowledged to vest in the substituted priest, because otherwise the sacrificer's rites could not be complete: the law *it is said*, does not declare it an offence to forsake the wife *of an officiating priest*; for she is an ignorant person. That is denied; because, the decendants of an officiating priest having the same right *to the office* which they have to inheritance *in general*, (on the admission of property in that office,) the forsaking of an ignorant person is limited to the actual performance of the rites. It is no where seen, that, a wife and a daughter's son being left by an officiating priest, the wife shall be entitled to the remainder of the estate, and the daughter's son be entitled to the *perquisites of the* office.

If this argument be proposed, the answer is, the same text which declared that hereditary priests should not be forsaken, except ignorant persons: and that authority avails not, in this case, to confer property on one who is not a learned priest. As for what is alleged, that the wife is entitled to the wealth, and that there is no settled usage entitling the daughter's son to take the office; the parity between the wealth and the office may arise from favour shown by the daughter's son and by the sacrificers, or from mistake: usage alone is no authority, unless it be confirmed by construction of *express* ordinances.

On this point it is argued, that, as the rites cannot be performed by an ignorant or disabled person, the law directs that he shall be forsaken, intending that the rites should be performed by means of a substitute; but the ignorant person has property in the sacrificial fees and the like, as the owner *of a slave has property* in the wealth acquired by the slave: and this construction should be settled on the strength of the admission of a property *vesting in the heir*. The text which ordains that "a person unable to act shall appoint another to act for him," is the foundation *of this construction*: but the property of an outcaste, or other person disqualified for solemn rites, is absolutely lost, in the same manner with his right to the paternal gold, silver, and the like. This will be explained in the fifth book, on Inheritance. Wives and others, disqualified by sex for the performance of holy rites, cannot appoint a substitute; as a defiled person cannot perform a solemn act ordained by the *Védas*: therefore wives have no property in the office of priest.

If the daughter of an officiating priest have a son, has that son a property in the office? If the daughter's son have such a right, then should a daughter likely to bear a son, and a son of the maternal great-grandfather's daughter, be left, he would be entitled to the office: but that is not supported by usage, nor by common sense; and there would be no certainty in regard to what should follow, if a daughter's son be afterwards born. If it be said, the daughter's son has not such a property; then the reason of the law is transgressed: for there is nothing to prevent the property of the daughter's son in his maternal grandfather's wealth, if it be not resisted by a right vested in some other heir, *the male descendant, the wife, or* the daughter of the *last* possessor; and this office is absolutely similar to wealth.

The text which forbids the dismission of an hereditary priest, does not imply that his heir shall not be dismissed, but implies that a person appointed by the grandfather or other ancestor shall not be forsaken: thus no difficulty affects the terms *of the text*. That is denied; for the practice is not such.

Therefore the difficulty is thus reconciled; women are entitled to that only for which they are qualified. In regard to the assertion, that women, being disqualified, cannot appoint a substitute, this must be understood: being disqualified for solemn acts ordained by the *Védas*, they cannot appoint a substitute for such acts; but, qualified for worldly acts, nothing prevents their appointment of a substitute for temporal *affairs*: and the right should devolve on the next in succession, under the text *quoted in another place* (Book 5, v. 477), and because women are dependent on men. Grain and similar property may be consumed by a woman entitled *to the succession*; but gold, silver, and the like, should be preserved: if she cannot *guard it*, let it be intrusted to her husband's heir, as will be mentioned under the title of inheritance. Here, since a woman cannot preserve the office, it should be executed by her husband's daughter's son, or other heir: but the produce should be enjoyed by the woman. However, should the daughter's son be at variance with his maternal grandmother, it may be executed by another person: he is not entitled to his maternal grandfather's property, if that grandfather leave a wife: and should the maternal grandmother litigate, it must be amicably adjusted.

The usage in regard to *'Agrahāricas* and others has been briefly discussed. No more express ordinance is found to determine, consistently with usage, the suits which arise on these subjects. If ordinances alone be received, there is no authority for establishing the right of their heirs: and many excellent persons do not admit the rules of inheritance in these cases.

"There is no offence in forsaking an *unbidden* priest who officiates of his own accord (43, 3)." The word is interpreted *officiating* priest in the *Vivāda Retnācara* and *Vivāda Chintāmeni*. If any *Brāhmana*, of his own accord, attempt the performance of holy rites for any person, and that person, when informed of it, forbid him, the sacrificer shall not be amerced *for subsequent desertion*. But it must be considered, that, if the sacrificer, though informed of it, have not *at first* forbidden him, but afterwards, when some part of the rites has been performed, do forbid him, he shall be amerced; for, not to forbid, is to assent: under this rule, *his silence* amounting to full assent, the priest is absolutely appointed by himself, and it would be improper to dismiss him from that ceremony. Though it be not mentioned by authors, this is consistent with common sense.

44.

VRĬHASPATI:—They are declared to be of three sorts; coming of their own accord, hereditarily employed, and appointed by *the sacrificer* himself *for that turn*: even so should the business be performed by them.

"They;" meaning officiating priests. "Coming;" voluntarily *officiating*. "Hereditarily employed;" appointed by former persons. "Even so should the business be performed;" that is, the rites should be performed as abovementioned. Such is the sense *of the text*. But some consider this text as intending concerns among partners in general: thus, the sense would be, partners are of three sorts; accidentally entering into partnership, hereditarily engaged, (as a son after the death of a father, who was engaged in partnership,) and engaged by *the party* himself (that is, called in by him at the commencement of the undertaking). "Even so," &c. that is, the business should be adjusted in proportion to the shares, whether equal, less, or greater.

Here it should be considered, that, if five teachers be engaged to read holy books, and one expound the verses, and all the rest be reciting readers, gratuities are separately paid to each of them: and something is given by strangers who hear the recital, to the expounder of verses and the rest, either for the benefit of hearing, or from the satisfaction which their skill in recital affords: and, according to ancient and excellent usage, strangers as well as the employer give something respectively for particular stories; such as the story of LACSHMANA's eating *after his long fast*, in the recital of the *Rámáyana;* and the story of the dwarf's begging alms, in the *Sri Bhágavata;* and the marriage of DRAUPADÍ, in the *Mahábhárata*. In such cases, what is received both by the readers and the expounder should be *distributed* in shares; but what is given on account of peculiar excellence, or skill in recital, belongs to him to whom it is given. The shares should be distributed according to the number of readers; and the expounder shall have a half, a quarter, or some other share. At present such a custom subsists in some countries: though not declared by the law, it should be admitted on the strength of custom.

In this case, should the expounder obtain anything by the error of introducing a more excellent *story* on a less excellent occasion, (as LACSHMANA eating *after his long fast*, in *the recital of* the story of the *Mahábhárata*,) what is the rule? The answer is, if the readers assisted in the mistake, the distribution should be made as in the preceding cases; but if they did not assist in it, the whole belongs to the expounder; or if some of the readers did assist, they are entitled to shares of the reward, and the shares should be distributed according to the number of persons concerned.

From the mention of former persons, *or generations, it must be understood, that* the family-priest of the paternal grandfather, being superior *to others*, not the priest of the maternal grandfather, should never be forsaken; but should there be no paternal family-priest, or no paternal wealth, and the man succeed to *his* maternal grandfather, then it is proper that he should employ his family-priest. This, however, is merely an induction of common sense, not the import of the ordinance.

The known customs at holy places, such as *Gayá* and the like, and in other countries, should be maintained in judicial procedure.

SECT. III.—*On partnership in Loans, in Husbandry, in Arts, and in Plunder.*

45.

VRĬHASPATI:—The profits of those who *jointly* lend gold, grain, liquids, or the like, shall be proportioned to their respective shares *of the outlay*, whether equal, or more, or less: thus is the law settled.

2. Whatever property a man lends, with the assent of many, or whatever business he *so* causes to be performed, is considered as the act of all the partners.

Advance, or "lend," is explained in the *Retnácara*, make a written contract with a view to gain. A joint loan on interest is intended: the profits shall be proportioned to the shares in the principal loan; and the same

must be understood of loss: this is the settled rule and practice. What is lent to any person, with the assent of all the partners, is lent by all: and a contract which one partner makes with the assent of all, or his acceptance of a written contract of debt from a debtor, is considered as the act of all. Consequently, they all share the gain or loss on that loan; and the borrower, by that written contract, becomes debtor to all the partners: therefore, should any one of them adopt compulsory means for the recovery of the debt, he shall not be punished.

46.

Among persons bound jointly and severally, whoever is found may be compelled to pay the debt.*

As a debt must, under this text, be paid by any one survivor among several debtors jointly bound for the same debt; so any one survivor among several creditors jointly advancing a loan, may, consistently with the reason of the law, recover the whole debt: but the heir, or the king, not the partner, *ultimately* receives the property of the deceased; for the case is parallel to that of partnership in trade. How then may one survivor recover the whole property? If he recover not the whole, the heir of the deceased, or the king, might take the share belonging to the deceased, out of the proportion which the survivor recovered as his own share: therefore, he should endeavour to compel payment of the whole debt. But if the debtor declare, "this I pay thee for thy portion, the shares of the rest shall be paid hereafter;" the portion of the debt received by the survivor cannot be taken from him by any other person. It should not be argued, that, the recovery of a debt due to joint lenders being requisite, like the payment of a debt due from persons jointly bound for it, he shall be amerced if he neglect to recover it; but it is necessary that the heirs of the deceased should assist in the recovery of the debt. If the heirs assisted in the recovery, the debtor could not say, "I now pay thy share:" however, a penalty for not demanding the debt will be mentioned. It should not be argued, that, if the heirs of the deceased reside in another province, then, not being present, they cannot make the demand: the debt should therefore be recovered by the survivor; and if he accept his own share alone, he shall be amerced. The case being parallel to that of partnership in trade, it is necessary that the king should assist in the recovery of the debt: and here the demand *of payment* is similar to the custody of stock, in the case of partnership in trade. But if the king violate the law, is there any fault on the part of the heirs, that the loss should ultimately fall on them? No ordinance expressly requiring that it be recovered by the partner, it is a settled rule that the loss must be borne by the heirs. But, in fact, according to MISRA's exposition of the text of NÁREDA (19), the debt should be recovered by the partner, as the stock should be preserved in the case of partnership in trade. To neglect it, though able to recover it, is an offence; and the person who recovers the debt may receive a tenth part of it, as in a case of salvage.

When a loan on interest has been jointly advanced by five persons, if one die, and his heir be present, the heir should conclude the transaction: but if the successor reside in another province, then indeed the surviving partner should give notice to the king through the means of his officers, and the king should depute thither an officer appointed by himself; but if the king omit it, the partner in the loan should conclude the transaction, and

* Book I, v. 174.

send notice to the heir, that he may attend: however, should some cause prevent him from doing so, the partner may follow his own choice; no offence is thereby committed.

If the king conclude the transaction, he shall receive, in the order of the classes, a twentieth part from the property of a *Bráhmana*, a twelfth from that of a *Cshatriya*, a ninth from that of a *Vaisya*, and a sixth from that of a *Śúdra*. The case must necessarily be held similar to partnership in trade. Thus, in answer to the question, "who shall perform his duty if one partner die?" the rule is propounded, "on failure of heirs, the king;" for that is shown in the case of partnership in trade. Is a tax to be paid to the king in consideration of his executing the business? In answer to this question the rule is set forth, "let the king receive a sixth part, &c." (22, 1). But if it be foreign to the king, the difficulty is reconciled from the text before cited; "or, if there be no heir, another partner who is willing and able to act; if there be no such person, all the partners;" (19). However, should the king forbid it, his commands must not be disobeyed: the king forbids not anything without a special cause.

47.

VRĬHASPATI:—To a paternal or maternal kinsman, and to a friend, a loan may be made on a pledge only; to others, with a surety, or on a contract written or witnessed.

This text belongs to the general title of Loan and Payment; for the reason of the law is equally apposite *in all cases of loan*.

If one of several partners in money-lending, being skilled in business, ask, "shall I singly advance a loan to the proposed borrower?" in that case, should they assent, the loan advanced is lent by all the partners; as is declared by the preceding text (45, 2). In what mode should the loan be advanced? in what case? The legislator replies, "to a kinsman, &c.;" to any kinsman or friend of the partners, it should be advanced on a pledge, and one of sufficient value should be taken (Book I, v. 11.) The grounds of the law are these: if the kinsman do not repay the loan, but say, "I cannot now repay it;" compulsory means would be a breach of the regard due to him, and therefore the debt may be irrecoverable: but if a pledge be taken, the debt may be recovered, by the sale of it at the expiration of the stipulated period, or at the end of eighty months or the like. From others it is not necessary that a pledge should be taken; he therefore mentions two modes, according to the honesty or dishonesty of the man, "to others, &c.:" in default of a surety, a loan may be advanced to a dishonest man, on a contract written or witnessed.

48.

VRĬHASPATI:—At pleasure, *or without a time limited for payment*, may gold or silver be lent; but liquids and grain, for a limited time: by the custom of the country must the loan and the payment be regulated.

At pleasure, with or without a time limited for payment, may gold or silver be lent; but, for liquids and grain, a limited time is necessary.

The *Retnácara*.

The time must be regulated by the custom of the country; and the payment must be regulated by the time agreed on. Under the text of

HÁRÍTA, (Book I, v. 44, 2,) grain is doubled at the time of harvest; but if no time have been limited, it is not more than trebled even after a hundred years: therefore grain should be lent for a time limited to the next harvest; and if it be not re-paid at the stipulated time, it may bear wheel-interest. But interest is receivable on gold, silver, or the like, at the *monthly* rate of an eightieth part; therefore it daily accumulates at that rate. Afterwards, when the debt is doubled, it should be recovered, or wheel-interest be stipulated.

49.*

VRĬHASPATI:—After the time for payment has past, and when the interest ceases, *on becoming equal to the principal,* the creditor may either recover his debt, or require a new writing in the form of wheel-interest.

On grain, though not paid at the time of harvest, interest is not *considered as having* ceased, *because it has become equal to the principal,* and therefore wheel-interest does not arise; but if a time were limited, wheel-interest may be required. Interest on liquids is similar to that on grain; for, in the sequel of the text, HÁRÍTA ordains, that "on clarified butter, salt, and raw sugar, the interest may make the debt octuple:" and this follows from the exposition of the *Retnácara,* on the text of HÁRÍTA. As grain is doubled at the time of harvest, and, if the debtor cannot then repay it, is trebled, and not more; so is wool and cotton: but the fibres of grass, clarified butter, salt, and raw sugar, in one year, became octuple. Therefore the exposition of the *Retnácara* on this text should be admitted. But reference is made to the custom of the country: a loan should not be made in such a form, in a country where such a custom exists not; for this text is superseded by the text of NÁREDA (Book I, v. 45, 1). In some parts of the country, grain is received back with an increase of half the loan; in others, with an increase of a quarter: the loan and payment should be so regulated.

It must be considered, that if a partner make a loan, in contradiction to this law, at his own pleasure, without a pledge, and without a time limited for payment, he incurs blame, as appears from the tenor of the text: but if the other partners consent to his making the loan at his pleasure, there is no offence. Yet if a loan be made to a kinsman without a pledge, and he endeavour to discharge the debt, but happen to be drowned with his family, the lender is not free from blame. Such is the method suggested by common sense.

But some hold, that this text does not declare an offence, but shows how a loan should be made. That is wrong; for, were it so, the text should have been inserted under the title of Loan and Payment, immediately after the text there quoted (Book I, v. 11).

50.

VRĬHASPATI:—What has been lent by two or more jointly, must be jointly demanded by them: any one of such lenders, who refuses to join in the demand, shall forfeit his share of the interest.

* Book I, v. 255.

If any one of the joint lenders ask, "shall a loan be made to this proposed borrower?" In that case, if the others say, "we will jointly lend it," let all *subsequently* join in the demand of what has been so lent: but if one, though able, do not join in the demand, he shall forfeit his share of the interest. But if the authority for making or refusing loans be committed to one person, since it becomes his part to demand payment, and the act was done with a view to gain, it is not fit that another, who does not join in the demand, should forfeit his share of the interest.

51.

VRIHASPATI:—The law concerning loans has been already propounded, and *therefore* it is now concisely delivered; hear the rules for husbandmen and others, which are thus declared:

2. Prudent men conduct cultivation, in partnership with those who are equally provided with beasts of burden, labourers, seed, land, and the implements of husbandry.
3. *They should* not *cultivate* common pastures, places reserved for cattle, nor the king's highway; let them purposely avoid barren land, and fields infested by vermin:
4. Sowing, at the proper season, land well situated to receive and retain water, capable of irrigation, surrounded with fields, and well tilled, the cultivator will enjoy a produce.
5. Let no prudent husbandman admit lean cattle, old, undersized, diseased, vicious, blind of one eye, or lame.
6. He by whose deficiency in cattle and seed a loss happens in the joint cultivation, shall indemnify all the cultivators:
7. This ancient rule has been declared for husbandmen.

The law concerning loans has been already propounded, under the title of Loans and Payment; now, therefore, in declaring the law of partnership in loans on interest, it is concisely delivered: such is the meaning of the text. Consequently the various cases of pledge and so forth, which have been delivered under the title of Loans and Payment, must be also understood under this head: therefore should a pledge be destroyed by the fault of all the creditors, it must be made good by all, and so forth. But, should the pledge be destroyed by the fault of one of the creditors, it must be made good by him; and if it be destroyed by the act of GOD, it is the debtor's loss. These and other rules should be considered as inductions from the reason of the law, or from express ordinances. Again: if the debtor die, the property may be recovered from the surety; but, in this case, if any one of the creditors, from a motive of tenderness or of knavery, release the surety, the fault is his. This and other rules should be admitted.

"Hear the rules;" that is, what should be done by husbandmen and others. "Beasts of burden;" oxen. "Labourers;" servants employed in the business of husbandry. "Seed" fit for producing vegetation; in common acceptation, it signifies grain and the like. "Land;" fields on which grain is sown. "Implements of husbandry;" ploughs and the like. Agri-

culture should be conducted in partnership with persons who are equally provided with these requisites, that no dispute may subsequently arise, because less has been contributed by one partner *than by another*.

A portion of land reserved for grass is called "a common pasture:" so the *Retnácara*. Neither a common pasture, nor a place reserved for cattle, nor the king's highway, *should be cultivated:* as is inferred from what precedes. This is merely an incidental command respecting agriculture; it is not here supposed to become a subject of litigation. Or it may be thus explained: if a man unite with one who cultivates land reserved for cattle, the king may say, "why dost thou cultivate land reserved for cattle?" If it be answered, "by his partner's direction;" he may be reproved in these words, "shall the town be destroyed by thee, because he directs it?" Therefore partnership should not be formed with a man who thus transgresses the law, and it is an offence in the partners who share profit obtained by this breach of rule.

"Barren land" does not even support the vegetation of grass; how should grain be raised there by the utmost labour? From the number of small cells, "land infested by vermin" affords no produce, and the ploughs and other implements are much injured: therefore partners in husbandry should avoid such land; or a man should avoid it, lest, on seeing the produce small, he be reproached with not having well tilled his field. This is a direction to husbandmen to avoid an unproductive soil.

Low land, capable of receiving much water, and whence the water is not early drained; such clayey soil, surrounded with fields on all sides (that the trespasses of cattle may be prevented without trouble), and well tilled at the proper season, in the month of *Mágha* and so forth: the terms are so explained in the *Retnácara*. This text is an incidental direction for agriculture. Or where five persons jointly undertake cultivation with their own cattle and seed respectively, and agree to divide the produce after paying the king and others their due proportions of the produce, the text is applicable to such persons; therefore they should furnish equal proportions of seed: and where *Bráhmanas* or others jointly undertake agriculture on their own fields and with their own seed-grain respectively, and the agreement is nearly the same with that abovementioned, the text is applicable to them. In the first case, let the partners in husbandry cultivate land other than common pastures and so forth; two verses (51, 3 and 4) are intended to direct this: a direction concerning land and so forth was necessary for partners in husbandry. Both verses, propounding the mode of distinguishing land, are intended to show, that, in the third case, the land should be equally good. At present it often happens that men join in cultivation for the produce of their own fields only. The direction concerning land is here a repetition of the subject of cultivation: some additional meaning is intended; that is, perfect equality is not required.

"Lean cattle, &c." This text is applicable to the three cases,* and is intended as an instruction *to husbandmen*. Thus, he who purchases cattle in the intention of cultivating land, should purchase such as are different from what is described in the text. It is incidentally mentioned; for if he possess not the price of excellent cattle, he may even accept such as are there described, to employ them on his business. If the cattle, and so forth, belonging to all the partners in husbandry, be bad, they may in that case

* Cultivation by a single husbandman on his sole account; by husbandmen renting land in partnership; by the separate owners of land tilling the whole in partnership.

be admitted; otherwise husbandry could not be conducted in partnership, were the cattle and so forth belonging to every partner bad: and it is indicated by the expression "who are equally provided, &c." (51, 2). The exception against the cattle described removes the doubt, whether cattle, being equal in number, may be admitted, though unequal in strength, and other qualities: therefore parity is required, according to circumstances, in strength, qualities, and number.

In the second case, the text, as explained in the *Vivâda Chintâmeni*, directs, (v. 51, 6), that the law shall be sustained by him through whose want of materials the field has lain fallow. Thus one partner is appointed to sow one field, and the other partners being similarly appointed *to different parts of the joint business*, if the field remain unsown by the fault of the cattle belonging to one partner, and cannot, from the excess of rain, be sown on a subsequent day, and the field therefore remain fallow; in this case, grain equal to the produce of similar fields shall be deducted from his share; or if seed furnished by one partner be sown in a field cultivated by all the partners, and no plants vegetate, the seed being old and bad, in that case also it is his loss. In the case where the partners join in the cultivation only, if the field of one remain unsown, from the fault of another's cattle, he is entitled to receive, from the owner of the cattle, the *estimated* value of a crop from that field.

If one of the partners in husbandry be unable to act, his task should be finished by another person; for YÁJNYAWALCYA says, "this law is declared for partnership among priests who jointly officiate at holy rites, and among husbandmen or artificers" (31). The shares should be distributed in proportion to the cattle or things furnished; and seed and the like should be taken in proportion to the quantity of land or the number of cattle: but if the proportions of seed and the rest be unequal, the adjustment should be made on their value, otherwise there can be no certainty in regard to the shares: however, should there be a specifick agreement for unequal shares, the distribution must be made accordingly. All should join in preserving the field and the like: if one refuse to contribute to its preservation, he shall forfeit his share of the profit: and profit is thus ascertained; "what remains over and above the price of cattle, seed, &c." If one preserve the common stock by the utmost exertion, he shall receive a tenth part of it. Him who has recourse to fraudulent ways, let the partners expel without profit (31): consequently, should a fraud committed by one of the partners be detected after the land belonging to all the partners has been sown in the month of *Bhádra*; in that case, restoring to him his stock in seed, cattle, and the like, and giving him half the produce of his own land, let them expel him: but if they cultivate in partnership the king's land, the payment of half the produce to the partner expelled is not admitted. Should one of the partners die, let the king, or other person, according to circumstances, keep his share of the stock, and deliver it to the heirs *when they appear*. All this, premised under the head of Partnership in Trade, must also be understood in this case.

52.

VRĬHASPATI:—A manufacturer of gold *and silver*, of baser metals, of thread, of wood, stones and leather, or a man who is skilled in minute discrimination, is called, by the learned, *Śilpí* or *artisan*

2. And, when goldsmiths and the rest exercise their arts jointly, they shall receive pay in due shares according to their work.

One reading gives, "a manufacturer of gold, silver, and leaves," that is, leaves of the palm-tree and the like. CHANDÉSWARA reads "thread," (*sútra* instead of *patra.*)

"A manufacturer of gold and the rest;" one who alters the form of the substance; who works it up, from a *shapeless* lump, into ornaments or the like. "Skilled in minute discrimination;" well acquainted with minute parts; able to distinguish the portions of copper or silver contained in gold and so forth; discriminating the smooth and good parts of leaves, wood, and the like; or minutely acquainted with the natural qualities of the substances, and able to distinguish them.

Manufacture and such minute discrimination are severally called arts; but both united constitute superior art: thus, if some goldsmith knows not the assay of gold, but makes ornaments and the like, he is an artisan; and so is one who does not manufacture, but assays gold: and herein many unite; because many are required to confirm an assay. It is objected, since there can be no joint exertion in assaying gold and the like without property, there can be no separate head of Judicial Procedure; therefore the *specifick* mention of this was superfluous in discussing the title of Concerns among Partners. It should not be answered, when several persons are jointly employed in assaying gold belonging to any man, there is partnership: were it so, it should be mentioned under the title of Non-payment of Wages, for they are hired workmen. Nor should it be argued, that "skilled in minute discrimination" is not an independent term, but an epithet of "manufacturer," and that the sense is, "a manufacturer of gold and so forth, if he be skilled in his art, is called *Silpí*, or artisan." Were it so, a manufacturer unskilled in his art, not being *expressly* mentioned, would be excluded from this head of Judicial Procedure: if skill must necessarily be supposed in all manufacturers, the epithet is superfluous; and it is irregular to employ it as a descriptive, *and consequently superfluous*, epithet. Nor let it be argued, that persons who are skilled in assaying buy and sell gold and the like: by their skill and assay distinguishing bad gold from good, they buy cheap and sell dear; and thus the mention of skill in assay has a reference to stock. Were it so, this would fall under the head of Partnership in Trade. To the objection thus proposed, the answer is, when gold or the like is intrusted to a goldsmith to work into ornaments and the like, and he receives hire in proportion to the specifick quantity ascertained by weight or otherwise, he is called a workman, but of a different description from those named in treating of slaves and hired servants. Some persons assay gold and the like for many different traders; they are not the particular servants of any one man, but receive pay in proportion to the specifick quantity ascertained by weight or otherwise, and are called artisans: at present such persons are often seen in the employment of sorters of money. From the practice of such a science, do they become artisans? This, like the manufacture of ornaments and other arts, not being included among the eighteen sciences, should be considered as a mechanical art.

Thus some expound the text. Others explain the term "skilled in gain," that is, well acquainted with the wages due to his labour; and this knowledge is an excellent qualification for an artisan. The sense is the same on the reading of CHANDÉSWARA and others; "well knowing the fruit *of his labour*" (*phalábhijnya*, instead of *calábhijnya.*)

JITÉNDRIYA, HELÁYUDHA, and VÁCHESPATI MISRA read "baser metals" instead of silver (*cupya* instead of *rúpya*). There is no material difference. Leather is in the plural number to imply other substances; for rope, balls of silk, bones, and other things must be understood, according to the circumstances of the case: otherwise, there would be no particular rule for such arts.

"According to their work" (52, 2): according to the work performed by four partners respectively, they shall receive their respective shares. For example, one melts the metal; another hammers the mass of gold or the like into the form of ornaments; a third solders the parts; and a fourth prepares the parts to be soldered. They shall receive pay according to the work thus or otherwise distributed.

53.

CÁTYÁYANA:—If four artisans be jointly employed, a young apprentice, a more experienced scholar, a good artist, and a teacher, they shall receive, in order, one share, two, three, and four shares, of the pay *divided into ten parts.*

These four (the apprentice, the scholar, the artist, and the teacher,) are distinguished by their skill in manufacture. The *Retnácara.*

Therefore, the pupils who melt metals, and so forth, under the directions of a teacher or other artist, receive one share; and the pupil should neither be the apprentice of another, nor one maintained by the instructor himself: consequently there is no contradiction to the text, which ordains that the teacher shall receive the gain on his pupil's labour (Book III, Chap. I, v. 20). But some hold, that the pupil's share is mentioned in contradistinction to the more experienced scholar and good artist, and that the pupil's share shall be received by the instructor.

The more experienced scholars, already taught, execute coarse work; they are inferior to the good artist, because they are unable to execute fine work. The good artists, having acquired experience, and being already skilled in manufacture, execute fine work, such as soldering the parts: in short, they nearly accomplish the business. The teachers instruct all the workmen as pupils; or, equal to the good artists, they also know the quantity of the parts, and are therefore in so much superior to them.

If there be an apprentice and teacher only, and no experienced scholar or good artist, what is the rule in that case? Who executes the work of the experienced scholar and good artist? If the apprentice do it, he is an artist: therefore the teacher should receive four shares; and the artist, three shares of the pay divided into seven parts. If he do not cause him to execute the work of a good artist, the teacher should be punished. But if there be a specifick agreement in this form, "thou shalt only perform the work of an apprentice," the work of the experienced scholar and good artist being executed by the teacher, he shall receive nine shares; and the pupil, one share only. If the apprentice execute the work of an experienced scholar, and the teacher perform his own part, and that of a good artist, the apprentice shall receive three shares; and the teacher, seven *shares of the pay divided into ten parts.* In fact, the definitions of apprentice and the rest are delivered in conformity with the etymological sense of the terms; but he who, under the directions of another, anyhow executes work with occasional mistakes, is an apprentice if he be subordinate to another. He who previ-

ously, instructed but, from want of practice in the particular exertion of manual labour, being incapable of fine work, executes business slowly, is called "a more experienced scholar." He who is capable of executing work, and is practised in the application of manual labour, but sometimes has occasion to ask instructions, is called a good, a skilful, or an able artist. But the instructor, like a teacher of the *Védas*, directs others, and can accomplish the work with certainty. In this mode should the law be interpreted: consequently there is no definite work for the apprentice and the rest.

In this case, hire, salvages, and so forth, must be understood as in partnership among traders: and if anything be destroyed by the fault of one among four persons, it must be made good by him; the owner should not refuse to pay the wages of all the workmen. But if anything be taken on a false pretence, in the presence of the teacher, who brought the good artist and the rest, the wages of all the workmen may be withheld; and the others shall receive their shares of pay from the teacher, or from the person in fault. This and other cases must be understood.

54.

VRĬHASPATI:—Where several men jointly build a house or a temple, or dig a pool, or make utensils of leather, let the chief workman receive a double share of the pay.

"The chief workman:" the principal workman. The *Retnácara.*

Some remark, that distinct shares, directed for four persons (the apprentice and the rest), should be understood of work other than the building of a house and the like: for VRĬHASPATI has not ordained such a distribution in the case of a house and so forth; but the principal workman employed in the building of a house and the like, shall receive a double share, and the others equal shares of the pay. But that does not coincide with the *Retnácaru*, where it is said, 'the text of CÁTYÁYANA (53) supposes one person giving, and another receiving instructions; in other cases the chief workman shall receive a double share: and thus there is no inconsistency.' Therefore, should an experienced scholar and a good artist only join in the work, without one person giving, and another receiving directions, the rule follows the text of VRĬHASPATI. The presence of persons giving and receiving directions does not suppose a teacher and pupil, but a workman of little skill, and another of great skill.

The meaning consequently is this: first mentioning the manufacture of gold, silver, cloths and so forth, and afterwards the building of a house, the legislator answers in the last text (54) the question which arises on the former text (52); "how shall pay be received according to the work in all cases, whether it be the manufacture of gold, or other work?" In all cases, whether it be the manufacture of gold, or other work, the chief workman shall receive a double share of the pay: and the text of CÁTYÁYANA is irrelevant. It should not be argued, that the text of CÁTYÁYANA relates to cases other than the manufacture of gold and so forth: for the *last* text (54) provides for other cases. Nor should it be argued, that both the texts of VRĬHASPATI are reciprocally illustrative of a general sense, but do not comprehend other cases. Were it so, that would be derogatory to the Sage, since a law must exist in regard to work not mentioned in either text. It is said, the first text (52, 1), interpreted in the same sense with the text of CÁTYÁYANA, may be a declaration of the law for the case where four

artisans are jointly employed; and the last text (54), where two workmen are employed. It should not be objected, that a different mode of partition is incongruous, because leather, is mentioned in both texts. There may be different modes of partition, the last text intending ornaments or utensils of leather, and the first, other manufactures of the same material: thus, when a covering of leather for a car is ordered by the owner, if one workman be skilful, and others be also employed, the chief workman shall receive a double share of the pay. To this proposed exposition the answer is, it does not seem reasonable to destroy the concordance between two texts of VRĬHASPATI's own code, *merely* for the purpose of reconciling one of them with the text of another legislator. In fact, since there can hardly be persons receiving and giving instructions in the building of a house, or the digging of a pool, and the like, the rule of distribution between two workmen might be suggested; but, four persons being required for the manufacture of ornaments, the rule of distribution among four is proper: and this results from what is said in the *Retnácara*. Thus, in building a house, one man carries the bricks and other materials; but another, being an intelligent workman, constructs the edifice: so, in building a habitation of grass and wood, some person brings and throws up the grass, wood, or other materials, and another constructs the house. In digging a pond, one digs the spots which are marked to prevent inequalities, or notices what should be taken or left by all the workmen; the others dig after him. In making utensils of leather, one sews the leather; the others, as pupils, stretch it. Is there not employment for four persons in building a house, as well as in making ornaments? Thus, one carries the bricks; another removes their inequalities, and fits them for the pillars or other uses; another again cements them in their proper places; a fourth, to raise a straight wall of masonry, causes the bricks to be placed properly: in a building of grass or wood, one man carries the wood; another cuts away rotten parts with an axe, and fits the wood; a third, by labour, joins two timbers; a fourth, lines the wall. In all three instances, reference may be made to skill in work: and the same may be understood of other work, as the case may be. To this question the answer is, if it be so in regard to the wall, still there is no employment for four persons of different descriptions in roofing the house, nor in constructing a house of bamboos, or building a house with unburnt bricks. In the text above cited (54) the term "house" intends such houses. But where there is employment for four persons, the former text (52, 1) is applicable: and this is actually said by the author of the *Retnácara*; 'the text of CÁTYÁYANA supposes one person giving, and another receiving instructions:' and the same should be understood of other cases. If three persons join in work, then the distribution should be settled in this form; for the rule is admitted, because they are included by their employments in the descriptions of apprentice and so forth.

Thus some expound the law. In some provinces it is the practice, in regard to the roofs of houses, to give the same pay to the man who throws up the grass, and to him who makes fast the string, but less than the pay of the thatcher: and in building houses of masonry, greater wages are given by the owner to one employed as chief workman, than to the others who assist him; but other labourers again carry the bricks, and perform the rest of the labour. This and other usages subsist. There can be no benefit from expatiating on the subject; for, wages are paid according to settled usage, and workmen are employed on special agreements. So much has been said to explain the law: it should be received as above explained.

55.

VṚIHASPATI :—This has been ordained by wise legislators for a band of musicians: let him who marks the time skilfully take a share and half, and let the singers have equal shares.

"He who marks the time skilfully" *(tálajnya)*; "*tála*" is explained by AMERA, measuring time and performance: that again is explained in the commentary on his dictionary, the measure of the appointed time of utterance, one or two moments; and the discrimination of exact performance. Consequently, in the case of singing, the utterance of certain letters *or syllables* of the song, after once, twice, or thrice uttering certain other letters *or syllables,* is measurement of time, and called *tála*: in fact it signifies measuring the time during which a word or sound must be held, and the time when another syllable should be uttered after the utterance of that sound; as in the verse of the *Gítagóvinda*, "*Herir iha mudg'ha bad'hú nicaré vilásini vilasati céliparé,*"* a momentary pause is made at "*herir iha*;" and the sound of *the last syllables of* "*badhú*" and "*nicaré*" is prolonged during the twinkling of an eye, or during half that time, or during a very minute space of time: this is called measuring time. Measure of performance consists in regulating the effort of the singer with his tongue or other organ of speech to utter the letter or syllable: the intimation of it by a contemporary stamp of the foot on the ground, or by clapping the hands, is called *(tála)* beating time. Though all the common acts to be done by the dancer, the musician, and the rest, with the utterance of low sounds, be not indicated, nor even the performance of loud musick, yet the step or gesture corresponding with a difficult passage is marked; how is the performance of a dancer and the rest measured? By the word "performance" steps and so forth are signified: consequently the hint to perform a certain step or gesture at the same time with the utterance of a certain sound, with which sound it ought to be performed, is the measure of performance, and it is called *tála*: measure is in this instance explained discrimination, and that consists in distinguishing the parts of the performance to be executed at a certain time, namely, that a certain act must be done immediately after a certian time: this is mentioned as suggested by the single term of "singers." But, in fact, whatever act is to be done, or sound to be uttered, immediately after a certain time, and whatever stroke on the ground or the like with hand, foot, and so forth, is to be given during the performance of musick at a certain time, according to the laws of musick and singing, the notice of that time, or hint for the performance, is meant by "measuring time and performance." Consequently beating time *and prompting* is applicable to singing, playing, dancing, and so forth.

Was it not superfluous to say, "let the singers have equal shares;" for that was already suggested by the allotment of a share and a half to him who marks time skilfully, since the marking of time belongs to singing only? No; for the term "marking time skilfully" denotes one who is skilful in marking time. Consequently he who teaches the rest to observe time skilfully, is denoted by the term. In this country such a man, in singing and the like, is the man who begins the song; for the rest sing as they are instructed by him, and the musician also plays the musick adapted to that

* HERI exults in the assemblage of amorous damsels. Asiatick Researches, vol. iii, p. 187. Or, as verbally translated by the same hand, HERI, O *my* amorous *friend*, delights in the highest of pleasures, in this assemblage of beautiful damsels.

song. In dancing and the like, a musician is sometimes *the leader of the band*; sometimes a dancer *leads it*. All this should be understood; for such a practice is remarked.

The term "this law" extends the law for artisans to a band of musicians. Consequently, if persons of two descriptions are employed as singers and musicians or the like, the rule of distribution among two persons is applicable; but if it be an employment of persons of four descriptions, the rule in regard to four persons is applicable: so, if there be employment for persons of three descriptions, the rule of distribution among three persons must be understood. "A share and a half;" half more than one share; let him who marks the time skilfully take one share, together with half a share: so the *Viváda Chintámeni* and *Retnácara*. If some *of the musicians* die, their shares of the pay, for so many days as they were employed, shall be delivered to their heirs, or to the king; and let the king receive them for safe custody: but let the associates of the deceased cause the work to be finished by some other person, whether the employment be that of singing or dancing.

56.

VRĬHASPATI:—If, *in time of war*, any property should be brought from the hostile territory by robbers, *or irregular soldiers*, authorized by their lord, they shall give a sixth part of it to the king, and divide the rest among themselves in due shares.

2. Let their chief receive four shares; the most valiant of them; three; the most active, two; and the rest share and share alike.

The *Viváda Chintámeni* explains the "chief," he who exerts mind and body; "valiant," resolute; "active," possessing superior strength. But CHANDÉSWARA, so explaining the chief and most valiant, says the third description means active in comparison with the rest.

Where robbers make incursions, one of them commands as their leader; some, armed with bows, swords, or the like, are posted on the road to prevent the motions of the people; others plunder; and the rest carry the loads: such an arrangement is signified by the text. The commander is the chief; for, skilled in counsel, uniting the rest, knowing the means of subsistence, he is pre-eminent: and all the rest act by his orders. This is expressed in the gloss, "he who exerts mind and body." His associates, who recede not from battle, but despise death, are described by the term "most valiant:" and these are posted on the road to prevent a surprise. Others, while the enemy is repelled by the most valiant, plunder foreign houses: these are deemed most active. Those who carry loads, furnishing corporal labour only, are inferior to the rest, and they receive share and share alike. "Active," expounded in the *Viváda Chintámeni*, possessing superior strength, will intend the same, if it be explained as denoting a person endowed with the strength requisite for breaking open doors, to enter foreign houses.

The shares should be distributed according to the numbers of each description: thus, if there be one chief, ten valiant, four active, and eleven inferior robbers, the plunder should be divided into fifty-three parts; but if the active robbers be able to perform the office of the most valiant, they may each receive three shares by special agreement.

57.

CÁTYÁYANA:—Of *an enemy's* property, brought from a foreign country by robbers commissioned by their lord, the king shall have a tenth part; and they shall divide the remainder by this rule:

2. The leader of the robbers shall have four shares of it; the bravest of his men, three; the most active, two; the others, equal shares.

3. If one of them, when they set out on their adventure, should be taken prisoner, whatever he may give for his ransom the rest shall pay equally with him.

CHANDÉSWARA says, "a tenth part, or sixth part, should be understood according to the nearness or distance of the foreign country." But MISRA holds, that the texts carry an implied sense. Thus, if the king protect the robbers, he shall receive a sixth part; being very distant, if he do not take measures *to protect them*, he shall have a tenth part only. Others hold, that a sixth part shall in general be received, for taxes have been ordained at the same rate: but if the expense and toil of the robbers be great, in consequence of their going to a very distant country, the king shall only receive a tenth part; and this rate ordained by the text is in the nature of a favour: it must be understood that the king ought not in this case to receive more than a tenth part.

"If one of them should be taken prisoner, &c." if one of the robbers going to and fro be taken prisoner, and pay ransom to the captor for his release, the remainder of the plunder, after deducting what is given for his ransom, should be divided in the mode abovementioned: but if the ransom be given after partition, it should be paid in equal shares by all the robbers; as suggested by the text, "the rest shall pay equally with him;" and because what had been already given, could hardly have been received before his capture. Such is the opinion of MISRA, and likewise of CHANDÉSWARA; but he expounds "taken prisoner," confined or stopped. In fact that should be admitted; for if he be taken prisoner, he must of course be confined near the royal residence; and if he be stopped, being watched, it is possible he may afterwards be taken prisoner: it is therefore necessary that he should, if possible, give money to satisfy the guards. That ransom is disbursed for *the behoof of* all the robbers. Virtually the same sense is deduced from both expositions. If one be taken prisoner, the rest may also be apprehended on his information: therefore his ransom is a benefit to the rest. This appears to be the meaning of the Sage.

From the mention of partition, after giving a part of the plunder to the king, it follows that the robbers have property in the wealth seized by them: and that property is by occupancy, as the king's right of property, acquired by conquest, in the wealth of a foreign realm. The king honestly acquires property in that wealth gained by occupancy, through his own exertions, by victory in a just war against another armed prince of equal power (Chap. IV, v. 20). But the property of robbers, acquired by occupancy, through their own exertions, in an unjust war, unauthorized by law, against men sleeping, unacquainted with the use of arms, and deficient in strength, or by intimidating *the owners*, belongs to the quality of darkness (Chap. IV, v. 27, 8).

Is not wealth stolen by a single robber, from the mansion of a sleeping householder, the property of the robber? VÁCHESPATI BHATTÁCHÁRYA answers in the affirmative.

It is said, a person taking property which lies before the owner sitting and awake, may make it his own. It cannot be objected, that the property, which is thus vested in the thief, is annulled by the occupancy of the owner. Even in the case of conquest, the conqueror's property would be annulled by the occupancy of the hostile prince. That is wrong; it must be affirmed, as is reasonable, that occupancy is not a mere acknowledgment *of ownership or acceptance of possession*, but the exercise *of it*: thus, wherever kings, acknowledging no human superior, exercise authority approved by the law, even there property arises; the exercise *of dominion over effects* by men, (whether they be robbers or not,) who acknowledge a human superior, namely, a king, if it be authorized by him, takes full effect; he who exercises such *dominion* has property. If the exercise *of dominion* by powerful robbers be admitted, even without the king's authority, still the occupancy of a proprietor, supported by the double power of the king, and of justice, prevents the occupancy of a weaker thief: and thus the property is in the owner, not in the thief. In the case of conquest and defeat of kings, whoever surpasses another in regal duties, in justice, and in armed forces, can prevent another's occupancy; and property is vested in him: thus the right is ascertained by discriminating the power of occupancy, *or retaining possession*; and property so established must necessarily be admitted.

Others deduce from the expression, "property brought by robbers authorized by their lord" (where the word lord intends the king), that robbers acquire a title to what is seized by them with the king's assent, as warriors gain property in the wealth of a foreign country. But robbers, unauthorized by the king, do not acquire a title *to effects stolen*. ŚÚLAPÁNI does not admit the property of thieves in stolen goods; and the text quoted from NÁREDA supposes robbers authorized by the king.

That is questionable. Since it is necessary to establish occupancy as the obvious cause of property in waifs, and in the wealth of foreign *conquered* kingdoms, the right of unauthorized robbers, suggested by the literal sense *of the text*, cannot be disproved without much trouble; and there appears no occasion for such trouble: the reverse of the literal sense of NAREDA's text would not be pertinent.

What then is the meaning of the expression, "authorized by their lord?" It intends punishment of *robbers* seizing the property of others without authority from their lord; for, the *Mahábhárata* and other works direct that robbers should be expelled from the kingdom: but those who rob with permission from their lord are his subjects, acting in his service. Such a king is contemptible, because he receives property partaking of the quality of darkness, and because he injures others. But, if any king, not afraid of *committing* injustice, act in this manner, the Sage has taken the trouble of regulating the partition: but this legislator has not authorized robbery. The expression "brought from a foreign country," forbids the authorizing of robbery in his own dominions, lest the kingdom be destroyed. But if any thieves rob in their own country, the same distribution of shares should be understood: and, should they rob without the king's assent, whether it become known to the king or not, their shares should be the same. This and other *rules* may be inferred from reasoning.

If those robbers be taken prisoners, what is the mode of proceeding in

that case? The king should cause the property to be restored *to the owner*. What king? he who protects his subjects, or he who protects robbers? The king who protects his subjects should cause the property to be restored *to the owner*. Shall the robbers in that case be punished or not? *The answer is*, how should the king punish them, since he is not their lord? Who shall receive the sixth part which is payable to the sovereign? The payment of it by the robber being necessary, he shall pay it to the king before whom he is brought. Should the protector of the robbers enter into a contest with the prince who protects his subjects? Though it be not directed by the law, he ought, on the reason of the law, to contend with him: for, how should he remain silent, having himself authorized the seizure of the property of others? and, the robbers having acquired property, partaking of a dark nature, in the stolen goods, if he do not contend with a foreign king who seizes those goods, how does he protect his own subjects? Or, if he do not protect them, how can he take revenue? for it would be inconsistent with the following text:—

58.

MENU:—That king who gives no protection, yet takes a sixth part of the grain as his revenue, wise men have considered as a prince who draws to him the foulness of all his people.

If he cannot give protection, let him restore the sixth of the grain he has received; and the king, even though he *generally* protect his subjects, should not take his revenue from them if he cannot recover their property from robbers.

Some hold, that the king, for the purpose of protecting the owners of property, should punish robbers whose place of abode is in a foreign territory; for, no distinction is intended, in the following text, between robbers coming from foreign countries, and thieves residing in his own dominions.

59.

MENU:—In restraining thieves and robbers, let the king use extreme diligence.

It is consistent with common sense to punish robbers apprehended by guards, whether they be inhabitants of foreign countries or of the same province. It is no judicial practice, nor induction of common sense, that, when robbers taken in the fact are brought before the king by his officers, he should inquire, and inflict punishment, if he discover them to be inhabitants of his own dominions, but release them if they be inhabitants of another country. Were it so, there would be no punishment for robbers who live in mountains and caves ruled by no king.

If robbers coming from foreign dominions be punished when taken in the fact, their punishment cannot afterwards be opposed; nor can their protector interfere to prevent their chastisement. But the unjust king, apprehending the publicity of the protection which he affords to robbers, though he may despise the consequences of his iniquity, may not *be willing to* make his conduct publick. It is said, he is not guilty of injustice in protecting the robbers. That may be true, but he should himself inflict punishment. He ought not to authorize robbery, nor ought he to permit pain to be inflicted on another whom he has authorized to rob.

But, in the case of robbery without *previous* authority, he truly authorizes it when he receives a sixth part of the plunder. But if he receive not

that sixth part, he should himself punish the robbers, or restore the goods to the owner. If robberies be committed in his dominions with his permission, since it is necessary that he should protect both *the owner and the thief*, he should cause the property to be restored to the true owner, and himself pay a fine, casting the amount of that fine into the water. But, according to the opinion of those who do not admit the amercement of kings, penance only shall be performed. If there be an universal monarch, possessing authority over all countries, and to whom all *other* princes are subordinate, may he impose fines on kings? This question should be examined under title of Robbery.

We may affirm, that, for the purpose of obtaining victory over a foreign and stronger kingdom, a king desirous of reducing the power of that kingdom commissions robbers, that the subjects distressed by their depredations may desert that realm, and that the riches of that kingdom may be thus diminished, and victory be obtained over it. This text has been delivered by the Sage as a rule of partition among robbers in such cases. The robbers have property in goods so taken, as warriors have property in horses and elephants of war, in arms, and the like: but property in wealth acquired by conquest in open war partakes of the quality of truth (58); and the property of robbers partakes of the quality of darkness; for it is gained by exciting terror, or by the murder of unarmed, timorous, and sleeping men, and is disapproved by the law. However, the law permits *a king* to reduce *the power of* a *foreign* kingdom by means of robbers, with a view to conquest; but the recourse to robbery from a motive of avarice, to increase his own treasure, is not justifiable: the law does not assent to the depredations of a king influenced by avarice; and the Sage has not declared a rule of partition for such cases. But *obedience to* the law itself, not avarice, must be the motive for the conquest of a foreign realm.

60.

YÁJNYAWALCYA:—Whatever be the *rights and* duties of a king protecting his own realm, even all those devolve on him who seizes a foreign kingdom.

To expatiate *on this subject* would be superfluous.

61.

CÁTYÁYANA:—The law *before* propounded relates to all partners, whether merchants, husbandmen, robbers *commissioned in war time*, or artizans, when they have made no special agreement for their shares.

When they have not made a special agreement respecting their shares. CHANDÉSWARA so expounds the text. Some explain it, "when they make a partition without having *previously* settled what shall be the share of each *partner*.

Other partners, not already mentioned, are comprehended in this text, as servants, boatmen, and others, working in partnership. In these cases also, the chief is entitled to a double share. If the labour be of three, four, or more kinds, one additional share is allowed for each degree of superior labour: however, it should be admitted, from the reason of the law, that the shares shall be equal, if the labour be of different natures but equal.

If some king, or rich man, employ learned persons to compile a system of law, that the law may be *generally* understood, and justice be observed, or to compose a poem for his gratification, or a work of any other kind, and give wealth to them for their maintenance, or as token of respect; then also, if he make not separate gifts to each, this same rule is applicable. Thus, if the labour be of two kinds, the gifts shall be distributed in single and double shares; if it be of three or more kinds, the distribution should be made accordingly, in the mode formerly mentioned. It should not be argued, that the shares may be regulated as in the performance of solemn rites; for, in the present instance, there are no *Brahmá*, *Bráhmanáchch'hansi*, and so forth, to give occasion for such a regulation of the shares.

Another incidental observation may be made: if the work be jointly composed by a teacher and pupil, a master and servant, or the like, there is no such rule of distribution. If the teacher, or other principal person, have promised anything, even that shall be given; otherwise it is optional. The teacher and the master, not the pupil or servant, shall share what is given as a recompense by the king or other *employer*. So likewise, if any loss arise. *But*, if the loss happen by the fault of a pupil or servant, the blame is imputable to that pupil or servant: if the book fail by his fault, it is his loss. If the teacher die, or be disabled, what was receivable by him may be taken by his heirs; and they should complete the work themselves, or by means of others. But, should there be no special agreement concerning an employment for a long space of time, the work and the gain may be regulated at the pleasure of the king, or other *employer*. Also, should the pupil die, the rule is similar; but here the option, *allowed* to the teacher, or his heir, is included in the case noticed of the king's option. The same should be understood where many join in composing a work, according to their respective superiority. These and other rules may be inferred from reasoning, by a simple exertion of intellect.

So, in joint conquest and in joint purchases, whatever share a partner has in the principal stock, such shall be his share of what is acquired: and the exertions for the preservation of the stock, and so forth, should be proportioned to the shares in the principal stock. Similar decisions should be given in the case of barter in partnership, and also in other cases.

CHAP. IV.

ON SUBTRACTION OF WHAT HAS BEEN GIVEN.

SECT. I.—*On Unalienable Property.*

1.

VRĬHASPATI:—This law, respecting concerns among partners, has been fully declared: *the law concerning* what may or may not be given, and what is or is not a valid gift, shall be next propounded.

Concerns among partners have been unfolded; undue gifts and the rest are next "unfolded." The construction of the sentence resumes this term from the context, because the sense requires it.

2.

NÁREDA:—When a man desires to recover a thing which was not duly given, it is called subtraction of what has been given; *and this is* a title of administrative justice.

2. In civil affairs, the law of gift is four-fold; what may or may not be given, and what is or is not a valid gift:

3. Things which may not be given, are eight; what may be given, is declared to be of one sort *only:* no valid gifts to be of seven sorts; void gifts assume sixteen forms.

The man who, not having duly given a chattel, wishes to retract the donation, is called a recanter of gift, and *this* is a title of law: he contends for withdrawing what has been given. Thus simple men interpret the word from its etymology: it intends a man who pleads that he has not duly given what the other party affirms to have been duly given. Others read, "what a man, &c. (*yat* instead of *yah*)." Some take the word "it" indeclinably; for, the dictionary of AMERA explains the co-relatives, "what, that; why, therefore:" because he desires *to withdraw the gift,* therefore the title of law is subtraction of what has been given. It follows, that the title of law refers to the wish *of retracting the gift*, or to the gift retracted.

The term used by MENU (Chap. I, v. 2, 1) denotes payment *or delivery;* non-delivery of what has been given is retraction of it. Delivery here intends a perfect gift: its converse is an imperfect gift, and is a title of law, namely, subtraction of what has been given. Given denotes the intention *of the giver expressed in this form,* "let this be thine:" *the word interpreted* subtraction, may signify imperfect *or undue* donation; where

that exists, there is imperfection of gift. In the text of NÁREDA, "*on what ground*," and "*that being ascertained in his gift*," may be supplied: "on what ground a man desires to retract a donation, that being ascertained in his gift, &c." for it has the same import with the text of MENU: the imperfection of the gift cancels it; accordingly the text expresses "not duly given." There is no difficulty in including under this title a man who desired to retract a gift which is *afterwards* determined to have been duly given, since a suit *at law* exists previous *to that decision*: but on the construction proposed by simple men, "not duly" would be unmeaning. Thus some interpret the text. But CULLÚCABHATTA explains the term employed in the text, "withdrawing or taking back." According to this interpretation, "*recovery desired*" must be supplied in the text of NÁREDA: "when a man desires to recover what has been given, the recovery desired by him is retraction of what has been given, and this is a title of administrative justice."

The gift may be imperfect, because the thing is unalienable, or because it is given by a person not entitled to give it. Thus the gift may be imperfect, because the chattel is unalienable, or because it is improperly given, or because it is given to a wrong person, or without the assent of the father and so forth, or at a time when the donor is defiled. So MISRA. This will be explained in another place, it is here mentioned incidentally.

"In civil affairs, &c." (2, 2): the rule to be established, that gifts made by a man afflicted with disease and the like are void, regards civil gifts, not donations for a religious purpose. This title of law does not extend to a gift made for a religious purpose: the donation is valid, if it be made by the owner *of the thing*.

3.

CÁTYÁYANA:—What a man has promised, in health or in sickness, for a religious purpose, must be given; and if he die without giving it, his son shall doubtless be compelled to deliver it.

RAGHUNANDANA and other authors expound this text, "what a man, even afflicted by sickness, has promised to give, must, if he die, be given by his son." It is not proper to say, that what he has promised must necessarily be delivered, but the gift is not valid. The rule must be understood of other cases as well as of sickness; for the reason of the law is equally applicable.

"The law of gift is four-fold;" literally, the path of donation (2, 2). The ways of arriving at, or receding from, the annulling of property, and thereby effecting donation, are four. Thus, by the way of void gifts, the act recedes therefrom; by the way of valid gifts, it arrives thereat: the rest will be evident in course. The wish of retracting an invalid gift takes effect; the wish of withdrawing a valid gift is fruitless. This is the whole rule concerning subtraction of what has been given; for an invalid gift only may be withdrawn.

Wherever the gift is invalid, *the property* is actually recovered: how then does the man "wish" to recover it? Where effects are possessed by another under the semblance of a gift, a doubt arising whether they shall or shall not be recovered, the Sage directs that they shall be recovered if it be ascertained to be *merely* the semblance of a gift, but shall not be recovered if that be not ascertained. An invalid gift *is mentioned* to determine that the supposed donation is void.

Should not gifts be here said to be of two sorts, valid and invalid? why are they denominated from what may or may not be given; *for* there is no proper distinction, in treating of this subject, between what may and may not be given, and what is and is not a valid gift? Simple men reply, both are noticed incidentally: both are mentioned to denote that the gift of a son or a wife is imperfect, because they should not be given. For what purpose is it said that the gift of what may not be given is imperfect? The answer is, it appears that a fine is incurred by such a gift. Those things, in the giving of which there is sin, should not be given: and that sin is not expiable by penance alone; for, were it so, such gifts should be discussed under the title of Penance *and Expiation*: being noticed under the head of Judicial Procedure, it appears that the giver of what should not be given shall be amerced. Thus some *expound the law*: their opinion will hereafter be considered.

VRĬHASPATI has not mentioned the term "subtraction of what has been given;" but mentions the four-fold *distinction* of what may or may not be given, and what is and is not a valid gift: the rule must be deduced from the acceptation of the terms, 'what may not be given, &c.'

The eight things which may not be given are thus enumerated:

4.

NÁREDA:—What is bailed for delivery, what is lent for use, a pledge, joint-property, a deposit, a son, a wife, and the whole estate of a man who has issue living.

2. The Sages have declared unalienable even by a man oppressed with grievous calamities, and, *of course*, what has been promised to another.

What is bailed for the use of another *(anwáhita)* is a distinct kind of bailment, explained in the Chapter on Deposits. It is mentioned to show that it is comprehended under the general term of deposit, by the same rule by which one name of kine may denote cattle of that sort, and a synonymous term in the same sentence may intend cows only: consequently, there is nothing inconsistent with the number of eight *unalienable things*.

May it not be said that pledge and loans for use should not be repeated, for they are nearly allied to deposit? Some distinction may be admitted; because a pledge is connected with debt, and a loan for use gives dominion over the chattel to one who is not the owner: but bailment for delivery is a mere repetition, for the owner's dominion *over the chattel subsists in full force*; a thing deposited through the intervention of another, a chattel bailed by an absent man, and the like, are deposits generally, for they are only distinguished by minute differences.

MISRA reconciles the number by joining the words son and wife into one compound term: "a wife with a son, mentioned conjointly:" consequently, there is nothing inconsistent with the eight-fold distinction premised. But the text shows that a wife and a son may not be given, as the expression "the father goes with his son" denotes that both go.

5.

VRĬHASPATI:—The prohibition of giving away is declared to be eight-fold: a man shall not give joint-property, nor his son, nor his wife,

without their assent in extreme necessity, nor a pledge, nor all his wealth *if he have issue living,* nor a deposit, nor a thing borrowed for use, nor what he has promised to another.

In this text bailments for delivery and the like should be understood as comprehended under the term deposit.

Is it not superfluous to declare that deposits and the like may not be given? for, in their nature, they are unalienable, because they are the property of another; else it should also be said that the property of another, actually enjoyed by the owner, may not be given by a stranger. Consider it as mentioned for the sake of an amercement imposed on him who gives away deposits and the like. Is there no punishment for him who gives away the property of a stranger under other circumstances, that deposits and the like should be *specially* declared unalienable? Since, under other circumstances the property of a stranger cannot be given away without theft, the giver shall be punished as a thief: but, considering that deposits and the like, being actually in the depositary's power, might be given away *without suspicion of theft,* the beneficent Sage has declared them unalienable.

Others remark, that VIJNYÁNÉSWARA admits the creditor's property in a pledge; and the property of the borrower, in a thing borrowed for use and the like, may also be admitted: but the right of the owner is not annulled; *it subsists* like the concurrent property of husband and wife: therefore the borrower, but not a stranger, may, with the assent of the owner, aliene at pleasure a chattel borrowed for use. Thus, on the grounds of such a subordinate property, a gift or other alienation might be made; but the Sage prohibits the gift (4, 1), because that property is subordinate.

A gift of deposits and the like, made by mistake, is not valid (Chapter II, v. 27). Therefore deposits and the like, given away by mistake, may be recovered. With a view to this, MISRA has said, "the gift may be imperfect," because the chattel may have been unalienable." Others affirm, that creditors and the rest may create, by gift or the like, an interest equal *and similar* to their own.

"Joint-property" (4, 1), is explained, in the *Retnácara* and *Chintámeni* what belongs to more than one owner. Therefore the sense is, that one brother shall not, without the assent of the rest, give away undivided wealth held as the property of several brothers.

Shall he not give away the whole of the joint-property; or shall he not give away the amount of his own share? On the opinion of JÍMÚTAVAHANA delivered in his gloss on the text of VYÁSA (Chapter II, v. 6), "because the family would be injured by a sale, gift, or other *alienation,* effected by a distressed coheir as part-owner *of joint-property,*" some remark, that, if it were intended to forbid the sale of gift of the whole, the author would have said "they would be deprived of the means of subsistence if a gift or sale were made," thereby forbidding *the alienation of the whole.* There is no difference whether the sale or gift of the whole wealth be made by a parcener distressed or not distressed; consequently, it would be vain to contend for a partition or the like, with a distressed man, who had sold the amount of his own share *of the joint-property:* to obviate this consequence, even a parcener's sale or gift of his own share without the assent of the coheirs, is forbidden. Such is the principle *of the rule:* and here, from this prohibition of the sale or gift of his own share without the assent of the coheirs, it appears that the parcener shall be punished if he do so; for the texts of

NÁREDA and others, under the head of Judicial Procedure, show that joint-property may not be given away. At present, parceners do not make gifts or sales of undivided land, or other property, without the assent of the coheirs; each says, "how should I sell it? this property is not divided." Such is the general custom in some countries. But certain lawyers hold, that, if a parcener give or sell his own share, the king does not impose fines on trifling occasions; or the parceners, from indolence, or considering it as fruitless, do not inform the king: in this view *of the matter*, custom permits parceners to give or sell the amount of their own shares. If the maintenance of his family cannot be *provided by a parcener* without the sale of that property, and his wealthy coheir neither make a partition, nor consent to the sale, what shall be done in that case? The king, they say, on the application of the person who wishes to sell *his share*, should give attention to the matter. But here it must be understood, that joint-property is unalienable without the assent of the coheirs: however, should the gift or sale be actually made, it is valid; for the following text may relate to the amount of the respective portions *of joint-property*, as well as to divided shares; and the will of the owner being a sufficient cause of vesting property in another, the parcener may not be able to bear the delay of partition, or of obtaining the assent of his coheir.

6.

NÁREDA:—If they severally give or sell their own *undivided* shares, they may do what they please with their property of all sorts, for surely they have dominion over their own.

It should not be objected, that the assent of coheirs should be established under the authority of the text, as a necessary association for the disposal of another's right in undivided immoveable property: thus, without the union of all the *requisite* causes, the effect of conferring property on another does not take place. Since the text may be pertinent in the sense above mentioned, it is wrong to impose the difficulty of establishing such an association. Herein SRÍCRÍSHNA TERCÁLANCÁRA concurs. But if a parcener, without the assent of his coheirs, give the whole joint-property, the gift is null; for the joint-property of all cannot be devested by the act of one.

It is questioned whether his own property be, or be not, annulled by the act of a single parcener. It should not be said that his own property is not annulled, because the gift, being improperly made, is in its own nature imperfect, and is void as the act of a man partly destitute of ownership. There is nothing to prevent the annulling of *his own* property, since the gift, which he himself makes with the intention of annulling the rights of all the parceners in that chattel, is the act of an owner, of whom property is predicable. Consequently the ownership of the giver appears in this instance to be alienable: but the ownership of the rest subsists *in full force*. The meaning of ancient authors, who hold a gift of joint-property to be void, is the same. But a parcener's gift of his own share is valid. All the brothers have each their respective predicable property in all the effects.

It should not be objected, that, when the father dies, if one common property in the same thing be vested in several brothers; and, should one of these die, if the right of all the parceners be annulled, and another property be vested in the *surviving* brothers, together with the son of the *deceased* brother, it is troublesome repeatedly to establish joint-property vesting in many persons; therefore the property in the effects vests in the

persons severally. After the death of a brother, it being necessary to establish a single property vesting in his son after the annulling of his single property, we find, *say these lawyers*, no greater difficulty in establishing a property not dissimilar predicated of many persons. It must be therefore established, that the ownership of all is, or is not, annulled by the act of one; not that the giver's right is annulled; and that the property of the rest subsists. These lawyers therefore think that the gift of one may be valid as the gift of all.

To that argument there is this objection: it suits the opinion in which property is referred to things; but it does not accord with the sentiments of the *Naiyáyicas*, who dissent from that opinion, and refer property to persons: thus it is difficult to establish that the ownership of all the brothers is annulled upon the death of one; and no quality, except conjunction and the like, is acknowledged to be inherent in two individuals *at the same time*. Or, admitting single property, still there is no difficulty. Thus, after the right of all the brothers has been annulled on the death of one, a single property arises predicated of the surviving brothers and the heir of the deceased; not a distinct property predicated of the heir alone. In the present case also, after the right of all the parceners has been annulled by gift, property arises predicated of the other parceners and the donee; for gift only creates a property similar to that held by the owner, *who makes the gift.*

Is it sale *or gift* without ownership? What objection is there to its being *considered as* a true sale *or gift* without ownership? For it might be supposed that he shall be punished as a thief for such a gift or sale: yet that *punishment* is not *inflicted* in this instance, because the law has forbidden it (Book V, v. 377, 4); in the case of possible theft only, that punishment is consistent with common sense. But some hold, that it is not sale without ownership, because the parcener is not a person different from the owner of the chattel.

Then what shall be the punishment? The penalty directed for the gift of what is unalienable. That penalty will be quoted from JÍMÚTAVÁHANA and others, as expressly declared by MENU. This should be well examined.

It must be noticed, that if a parcener, without the assent of his coheirs, give or sell, to any person, some one chattel out of the whole undivided property, at a subsequent time, when partition is undertaken, that chattel should be included in his share.

Shall all the parceners divide the value of the effects *aliened*? or shall the other parceners receive back their portions of those effects, and the *donee or* buyer recover the price of their shares from the *donor or* seller? If the other parceners consent that the effects aliened should become a part of his share in the joint stock, then it may be included in his allotment: but if they do not consent to that adjustment, nor to receive their shares of the value, they may recover their shares of the effects. Otherwise they may *severally* insist, "this chattel must be received by me, it shall not be given to that brother; distribution shall be made by lot." But, in fact, there can be no distribution by lot in this instance; for the seller, whom that distribution would concern, is no longer an owner. It cannot be said, those effects are, of course, included in the seller's share. All the brothers having ownership in those effects, that ownership is not annulled.

Should it not be said, that, according to the opinion of JÍMÚTAVÁHANA, who contends for dispersed property, *vesting severally in the coparceners,*

sale, as well as distribution by lot, determines the property *in particular chattel;* otherwise a parcener selling any chattel, and consuming *the produce of the sale,* would be guilty of embezzling the property of another? It cannot be affirmed that there is no difficulty, because CÁTYÁYANA directs that his offence shall be *patiently* borne (Book V; v. 377, 4). Still, in the apprehension of sin, the penance directed for cases of doubt would be requisite; and he who consumes much, would undoubtedly be a sinner. A dissimilar property is not created, but a right proportionate to the share *of the donor or vender:* and if it be affirmed that he who sells for his subsistence that which he occupies is proved to have had property therein, it follows, that a single ownership exists in effects sold for subsistence, and the other parceners would not be entitled to a share of the effects so aliened. This question is thus answered: it is a maxim, that penances are similar to punishment; exemption from penance is therefore implied in exemption from punishment. The laws which ordain partition by lot and otherwise, ascertain property; but occupancy and the like does not ascertain it. If the property be doubtful, all the parceners are not entitled to shares; but, in this instance, if a sale be made for *necessary* consumption, the seller shall not be punished: otherwise, he may be chastised. It should not be objected, that the parceners could not receive equal shares, because the property cannot be determined by the decision of arbitrators, without the mutual assent of the contending parties *to the appointment of them;* and distribution by lot has been already set aside. In this case no distribution by lot does take place; but the other parceners do not abandon their shares. The arbitrators, to whom their complaint of the parcener's illegal act is referred, rejecting the vendor's plea, adjudge equal shares to all the parceners: and the notion of a property which requires specifick mutual assent *to authorize alienation,* supposes a *common* right vesting in all the parceners, like their property in single slave, or the like. For this purpose, the gift or alienation of undivided effects without the assent of coheirs is prohibited: a parcener is not forbidden to give his own share generally, without specifying particular chattels, in this form; "I give you my share;" for then the donee may be admitted, like a parcener, to a distribution by lot: but, even in that case, the assent of coheirs is required for the alienation of immoveable property (19, 5).

Joint-property is wealth belonging to more than one owner. MISRA says, 'the gift is invalid, because a man has not full dominion over joint-property, a wife, or a son: and the want of dominion, *in the other instance,* is *deduced* from the *same* reasoning, *which proves it in the case* of joint-property.' By "the same reasoning" he means that the ownership of one cannot be annulled by another. From MISRA's exposition it is inferred, that a parcener's gift of his own share of undivided property is void. But, to reconcile the two opinions of *different* authors, we adopt the sense inferrible by reasoning, and say, a gift of the whole joint-property is void, not a gift of the parcener's own share. Thus the donor cannot, at his own choice, annul the ownership of others; *but* he is not debarred from aliening his own single right in the joint-property; for such acts by partners in trade are often seen in *common* practice. This may be stated as the opinion of VÁCHESPATI BHATTÁCHÁRYA, and VIJNYANÉSWARA. Therefore, the gift is valid as far as the donor's share is concerned; but he shall be punished, and must perform penance. Such is the rule ordained concerning gift, or other *alienation* of what may not be given. 'That a thing may not be given' denotes that the gift is attended with sin: for this form of speech bears the sense of the

imperative. It does not denote that the gift is a void act: were it so, it would not differ from a void donation: and full dominion would not be noticed under this title of 'what may not be given.' If it be said, this title is intended to show punishment *for such gifts*, it is answered, this form of prohibition implying offence, the offender should be punished. Thus the gift of things which are enumerated among those which may not be given, is punishable; gifts enumerated among those which are void, are utterly null; and those noticed under both heads, are both *void and punishable*: as the gift of a deposit, or the like, of another's share in undivided property, and so forth.

In regard to a son or a wife, MISRA says, that the gift is void for want of full dominion. It appears, under the authority of the text, that there is no full dominion over a son and a wife who do not consent to the sale. Here this objection *occurs*: if a father, or husband, have power to give away a son, or wife, it should appear that they have the dominion of owners over them; and having ownership, how can their gift be void, being made by persons neither insane, nor otherwise incapable? and these are not enumerated among void gifts. Consequently the donation, even without the assent, is valid; but the donor shall be punished, for they are found in the number of unalienable things *and persons*. In the text of CÁTYÁYANA (7) the gift or sale of a son or wife without the assent of the parties interested, and without extreme necessity, is forbidden: it is not said that the gift or sale is void.

7.

CÁTYÁYANA:—A wife, or a son, or the whole of a man's estate, shall not be given away or sold without the assent of the persons interested; he must keep them himself.

2. But, in extreme necessity, he may give or sell them *with their assent*: otherwise, he must attempt no such thing: this has been settled in codes of law.

"Without *the* assent *of the persons interested*," (that is, of the son, wife, kinsmen and so forth,) these must not be sold nor given away.* If he neither give nor sell them, where shall he place them? The Sage replies, "he must keep them himself." MISRA observes, that if *the persons interested* do not assent *to the gift or sale*, these three *(the son, wife, and the whole of a man's estate)* must be retained by himself. Even with their assent, they can neither be sold nor given away unless in extreme distress (7, 2). It is wrong to affirm, that, after forbidding the gift or sale of a son and the rest without *the* assent *of the persons interested*, the admission of such a gift or sale in extreme distress shows that *the gift or sale* may be made in such circumstances even without *the* assent *of the persons interested*. NÁREDA, forbidding *such a* gift or sale, even in extreme distress (4), would contradict CÁTYÁYANA. Therefore, in the utmost distress, a son and the rest may be given away, with *the* assent *of the persons interested*: but, even in such circumstances, the gift may not be made without their assent. Such is the demonstrated rule.

* I omit a grammatical disquisition justifying the use of the masculine gender in the instance of a participle governed by unconnected words of the three genders.

A son is also given for the purpose of adoption *this being done* as *an act of* duty to relieve the adopter's distress arising from the want of male issue, no penalty is incurred: the assent *required* is *found in* the want of opposition; for, it is a rule that not to forbid is to assent. Therefore the gift of a son under the age of five years may be valid; and it appears that a donation may have force even without *the* assent *of the persons interested.* Since the gift of an unsuitable son, even though he do not assent, is valid, therefore the father may have full power to give away *his son;* and, from parity of reasoning, the same may be understood in regard to the gift of a wife. It should not be objected, that, under the authority of the text, the gift of a son or wife is valid without their assent, if they do not oppose the donation; but in the gift of an infant there can be no opposition *made by him.* It is troublesome to prove want of opposition *an* associated *cause* for the validity of *an act* devesting property, which is an effect of acts to which the assent of the owner is absolutely required. If a son be given with his consent, but in no extreme distress, shall the donor be punished? It is said, both the utmost distress and *the* assent *of the persons interested* being mentioned as causes of gift or sale, if either be wanting, it appears that punishment shall be *inflicted:* otherwise the mention of extreme distress would be unmeaning. Who will inform the king? Anyhow informed of it, the king may of himself ascertain the fact, and impose an amercement; as is shown in the case of *persons guilty of* drinking spirituous liquors and the like.

Some remark on the words of MISRA, "the gift of a son or wife, without their assent, is not valid," that the dominion over the son or wife is annulled by a gift made without their assent: but no property vests in the donee; for a son or wife, being rational beings, are very different from kine, gold, or the like. After the dominion over the son or wife was annulled, before property could vest in the donee, they became independent at the moment when dominion was annulled; and the father or husband having no dominion, his gift was then an act done without ownership. If that be true, is not every donation invalid, even *the gift* of cattle, of gold or the like, or of an infant under the age of five years; for there is a momentary want of ownership? The father or other person having dominion at the very time when the gift is made, it may be *considered as* one made by an independent person: but here the son subsequently becoming independent, the gift is invalid without his assent; for it is reasonable to justify property by the *joint* gift or sale of every independent person concerned. After fifteen years, a son is independent, if his parents be dead (15). The independence of a son, after his parent's interest ceases, being thus declared, the gift of an infant five years old is valid. How can paternity be valid in respect of sons self-given and the like; for they commit themselves to a father before the age of five years, and were not independent, their age being less than fifteen years? In the want of another owner, such adoptions being necessary, their independence may be admitted in practice. Both opinions should be well examined.

8.

VAŚISHT'HA:—A son formed of seminal fluids and of blood proceeds from his father and mother, as an effect from its cause: both parents have power, *for just reasons,* to give, to sell, or to desert him; but let no man give or accept an only son, since he must remain to raise

up a progeny for *the obsequies of* ancestors. Nor let a woman give or accept a son, unless with the assent of her lord.*

"Nor let a woman give or accept a son:" give, having a secondary sense without losing its literal meaning, comprehends sale and the like.

CHANDÉSWARA.

Consequently, by parity of reasoning, "may not be given," in the text of NÁREDA, denotes also that they may not be sold: and by *the same* parity of reasoning, the term cannot be taken in the secondary sense of sale only, when thus employed in a single text.

"Both parents have power, &c." Have the father and mother power jointly *to give, to sell, or to desert a son;* or, *have they that power* severally? Not the first: a gift made by the husband alone, after the death of his wife, would be void; but this is not intended, for, by declaring that a wife has not power to give *a son,* it is implied that the husband has that power. If the second construction be deemed admissible, still the husband's *previous* assent is required for a gift made by a widow.

A gift made by the husband while the wife is living, without her assent, to a person requesting it for the adoption of a son given, would be valid. This cannot be admitted. Were it so, that given son would not be forsaken by his mother: though a woman be dependent, the alienation of female property, or of *a mother's* rights over her son, by the gift of the husband *alone,* is not valid in law or reason. It is said, the word "or," which occurs in many texts concerning sons given, shows the right both of the father and mother severally to give a son: but there is this difference: "if the father be living, with his assent; if he be not living without it." And from this exposition of CHANDÉSWARA it is established, that *parents* have that right severally: but the filiation to another person must be admitted without desertion of the mother. This will be more fully discussed in book *the fifth,* On Inheritance, under the title of Sons given.

MISRA affirms, that "a woman cannot accept a son even with the assent of her lord, because she is precluded from the oblation to fire with holy words from the *Véda,* which is a part of *the rites on* the acceptance of a son, as will be mentioned under the title of Sons given." From this opinion VÁCHESPATI BHATTÁCHÁRYA and others dissent; for it is not said, by any author, that the principal object cannot be attained if a *secondary* part *of the rites* be prevented: women and *Śúdras,* though precluded from sacrifice, are observed to be qualified for dismissing a bull on *solemn* occasions. If adoption be null without an oblation to fire with holy words from the *Véda,* still nothing prevents the validity of the acceptance: *and* by that acceptance, according to MISRA's opinion, *the child* would fall under the description of a slave.

What some remark, that the wife has no right to give a son after the death of her lord without his previous assent, may be questioned; for, without an *express* ordinance, a woman's right, inferrible from the reason of the law, to annul her own property after the death of her husband, without authority from him, cannot be barred. It may be examined, under the title of Inheritance, whether the child be a son given *by his parent,* or a son self-given. Some explain it to be MISRA's intention, referring the text of VAŚISHT'HA to the son's assent, and, in his gloss on that text, discussing

* See the remainder of the text in Book V, (v. 273.)

the acceptance of a son given *for adoption*, to require the son's assent to the gift, even in the case of a son so adopted. This should be examined: the filiation of a son given under the age of five years is legally valid; his then utterance of consent would be taught like *the speech of* a parrot or the like; there is no authority for admitting, in judicial procedure, words spoken by an infant under the age fit for business: therefore, in ordaining that "both parents have power to give, to sell, or to desert a son," his assent is required for the gift or sale, if he be acquainted with affairs, *or adult in law*; and the acceptance of a son given *for adoption* is discussed incidentally, because the text may relate to that *subject*.

9.

DACSHA:—Joint-property, deposits for use, bailments in the form called *nyása*, pledges, a wife, her property, deposits for delivery, bailments *in general*, and the whole of a man's estate, if he have issue alive.

2. Are things which the learned have declared unalienable even in times of distress: the man who gives them away is a fool, and must expiate *the sin* by penance.

Here nine things are declared unalienable; but a son is not mentioned: including a son, ten things *and persons* may not be given. VRĬHASPATI (5) declares the prohibition of giving away to be eight-fold: though deposits may be considered as comprehended in his text under the term "*nyása*," still female property is not included in that text; and what is promised, not included by NÁREDA *in the number of eight unalienable things*, is included in that number by VRĬHASPATI. On this mutual contradiction. CHANDÉSWARA remarks: "it is not implied, that the enumeration of unalienable things, as delivered by other Sages, is curtailed by what each himself declares." Consequently, where nine things are *declared* unalienable, it is true of eight; and if ten or eleven things be so, the same is affirmed of nine or eight.

The female property of wives, like the property of a stranger, may not be given; for there is a want of ownership.

10.

CÁTYÁYANA:—Neither the husband, nor the son, nor the father, nor the brothers, have power to use or to aliene the legal property of women.

2. If any one of them shall consume the property of a woman against her consent, he shall be compelled to pay interest *to her*, and shall also pay a fine *to the king*.*

"Consume" is here employed in the comprehensive sense of sell, *or aliene*, &c.

"If there be issue alive" (9, 1): if there be a son, grandson, or great-grandson, who have equal dominion *over the property*, it is ordained by NÁREDA and many other Sages, that the whole of a man's estate may not be given away: and if any person, though he have issue living, do give away

* Cited in Book I, v. 73, and again in Book V, Chap. 9.

his whole estate, he shall be fined. This is evident; and penance is also expressly directed by DACSHA. On the doubt whether the gift be valid, notwithstanding the amercement and penance imposed, MISRA says, "the gift of a pledge, a deposit, and a bailment for use, is prevented by the want of property; and *the gift* of a son, a wife, a man's whole estate, and what has been promised *to another, is barred* by the authority of the text:" according to his opinion, the gift is not valid.

It should not be objected, that, by saying "gift is prevented," it is not meant that such a gift is utterly null, but that it should not be made. The gift is invalid, because the donor has not independant power over joint-property, a son, or a wife. The want of independent power *to dispose* of joint property *is founded* on reasoning; *the want of power to give away* a son, or a wife, against their consent, *is founded* on the authority of the text; and MISRA subsequently says, that "*the gift of* a man's whole estate if he have issue living, and any person's *gift* of what he has promised to *another, are invalid* under the authority of the text;" for it is proper to refer his words to the invalidity of the gift, since the form of expression implies a reference to what has preceded. Consequently it is an established rule, according to MISRA, that a gift of his whole estate by a man who has issue living, is invalid without the assent of the persons interested. But this supposes gifts for civil, not for religious uses; since it is recorded in *Puránas* and other works, that HERIŚCHANDRA and others gave their whole property for religious purposes; and NÁREDA limits the present title to civil affairs (2, 2).

If a man, reserving a single shell, give away all *the remainder of* his property, is the gift valid? It is said, even in this case, the gift is not valid; for the prohibition of giving away the whole estate is founded on the consequent distress of the family from want of subsistence. Therefore, after setting apart a sufficiency for the subsistence of the family, a gift of the remainder is valid; but a gift of the whole estate, reserving only a shell or the like, is not valid, as will be mentioned in explaining a text of VRĬHASPATI (18, 1): and JÍMÚTAVÁHANA says, "a gift or other *alienation* of the whole estate is forbidden on account of the subsistence of the family; for the family must necessarily be maintained."

What is a sufficiency for the maintenance of the family? Not so much as is consumed in one day by the actual members of it; for that would be inconsistent with approved usage; and duty would be violated, since the family might next day be deprived of subsistence.

11.

MENU:—The ample support of those who are entitled to maintenance, is rewarded with *bliss in* heaven; but hell is the portion of that man whose *family* is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care.

This text forbidding the family to be left to pain *and distress*, the prohibition would be ill observed by maintaining them for one day only; the prohibition is observed by maintaining them for life.

Then, anyhow estimating the duration of life, and setting apart a sufficiency for their maintenance during that period, a man may give away the remainder of his immoveable property and the like. This is not consistent with common sense; and NÁREDA declares it necessary to preserve wealth

12.

NÁREDA:—Even they who are born, or yet unborn, and they who exist in the womb, require funds for subsistence; the deprivation of the means of subsistence is reprehended.

"Funds for subsistence; means of living. This is supposed by JÍMÚTAVÁHANA to be *meant of* wealth inherited from ancestors; and immoveables constitute the best civil property: therefore the term is used in its acceptation of wealth generally. Reserving a sufficiency for consumption until other moveable property be obtained, a man may give away his moveable effects. This is the whole meaning.

Some hold it established on the reason of law, that, setting apart a sufficiency to maintain, for a long period, the present members of his family, and their families, as determined by five prudent persons, a man may give away his immoveable property, and the excess of his moveable property above what is required for subsistence until other moveable property be obtained, as also determined by five prudent persons. This should be well examined, for neither opinion is expressly delivered by any author; but the last opinion may be deemed consistent with settled usage.

JÍMÚTAVÁHANA does not admit the invalidity of a gift under these circumstances.

13.

YÁJNYAWALCYA:—Of precious *metals or* stones, of pearls, coral, *and other moveables*, the father has power to give or sell the whole; but neither the father, nor the grandfather, shall aliene the whole of his immoveable property.

14.

The same:—*Land or other* immoveable property, and slaves *employed in the cultivation of it*, a man shall neither give away nor sell, even though he acquired them himself, unless he convene all his sons.

These texts, quoted by JÍMÚTAVÁHANA, merely forbid such gifts or alienations to show the immorality of the act, not to show the invalidity of the gift or alienation. To this *remark* JÍMÚTAVÁHANA subjoin its grounds: "because there is not in this case any property different from that which, in *the instance of* other effects, denotes a right of disposing of them at pleasure;" and the fact cannot be altered even by a hundred texts: therefore the validity of a gift of land, whether inherited from ancestors, or acquired by *the donor* himself, being admitted because the incumbent has ownership, the same would be established in regard even to the whole of a man's estate; for the ownership is not different.

It should not be objected, that if the validity of the gift, *as deduced* from ownership alone, cannot be barred even by a hundred texts, then gifts which NÁREDA declares void (53) would be valid: but if the nullity of this gift be established from the sense of the words "not given," the invalidity of that gift may be established from the sense of the words "what may not be given;" and the expression used in the text of YÁJNYAWALCYA, signifying disqualification, the invalidity of the gift may be established, as it is a gift by a person not entitled *to aliene such property*: in

regard to what has descended from an ancestor, VRĬHASPATI will be quoted for the validity of the gift, if made with the assent of the coheirs (18, 4). It is ordained by YÁJNYAWALCYA and NÁREDA (53 and 54), that, in certain cases, the act is invalid or null, and it is proper to establish the invalidity of such gifts: but the term "what may not be given," shows a moral offence, else "what may and may not be given," would not be separately propounded. The text of VRĬHASPATI signifies, that the gift has validity, because, being made by one not suspected of being influenced by lust or the like, it is excluded from the number of void gifts; and because there is no objection to its validity, since it is not the act of a person of unsound mind.

Be it anyhow in regard to the whole of a man's estate acquired by himself, but the gift of what has descended from an ancestor, by a man who has a son *living*, is void, because he has not independent power *over that property;* for NÁREDA declares null a gift made by one who is not *an* independent *owner*; and the law, quoted by VÁCHESPATI BHATTÁCHARYA and RAGHUNANDANA, declares a father not to be independent.

15.

Smrĭti:—While the eldest brother lives, the rest are not independent; *but* seniority is founded both on virtue and on age;

2. All subjects are dependent, the king *alone* is free: a pupil is declared dependent; freedom belongs to his teacher:

3. All wives, sons, slaves, and unmarried girls are dependent: and a householder is not uncontrolled in regard to what has descended from an ancestor.

4. An infant (*śiśu*), before his eighth year, must be considered as similar to a child in the womb; but a youth or adolescent (*pógenda*) is called a minor until he has entered his sixteenth year:

5. Afterwards *he is considered* as acquainted with affairs, *or adult in law,* and becomes independent on the death of both parents; *but,* however old, he is not deemed independent while they live.*

The inference is wrong; for these texts do not propound a dependence invalidating civil acts. The sense of the text is this: while the eldest brother lives, (eldest in age if all be equally virtuous, or younger in age but endued with qualities fitted for the support of the family,) the rest of the brethren should not give, sell, or aliene at pleasure, *any part of the estate,* without his consent: the reason is, that, since they are maintained by his abilities, a gift or alienation, which may weaken his power to *maintain* them, would be immoral. All subjects residing with the king's assent on land owned by him, are occupied in the acquisition of wealth; with his assent they may possess land; and if it be seized by another, the king will compel him to restore it: therefore it is proper that they should make gifts or sales with his assent. As long as a pupil resides with his teacher, he should not even eat without his order, *because it is his duty* to please his teacher: thus

* Cited in this place without the name of the author; but the three first verses are quoted as NÁREDA's, in the third article of the second section: the subsequent texts are cited from CÁTYÁYANA in Book I.

it is recorded in the *Mahábhárata*, that UPAMANYA became blind from eating leaves of asclepias, when forbidden to take food. A student should not make a gift, sale or other alienation, without his teacher's permission. Unmarried daughters, and other members of the family, are dependent: they can do nothing without the consent of the householder; for the master of the family partakes of the virtue and vice resulting from the acts of women. It cannot be established, that a gift of their own property, by these persons, is invalid without the assent of their respective superiors: nor does any one say, that, while there is a teacher, the student's gift of his own paternal property is invalid without the assent of the preceptor. Similarly, therefore, a gift made by a householder, though he have sons living, is valid without their assent, for it would be irregular to assign several meanings to the word dependent under the same head: but it is forbidden to give away, without the assent of the sons, property, whether moveable or immoveable, which has descended from the paternal grandfather.

The sense of the last text (15, 5) is, that the act of a minor under the age of sixteen years is invalid, because it is the act of an infant: after that age, his acts are valid; but it is necessary that he should take his father's orders. If it be said, that the sense of the text is this: after the age of sixteen years a youth is independent if his parents be dead; to prevent the validity of a sale or alienation by an infant under the age of sixteen years, whose parents are dead, or by a youth above that age, whose parents are living, two conditions are specified; his age of sixteens years, and the death of his parents: this interpretation is denied; for, the text mentioning that "he is *considered as* acquainted with affairs," shows him qualified for civil affairs in his sixteenth year, and independent on the death of his parents. If "minor" and "independent" were held the same, then NÁREDA would not have distinguished a minor from a person who is not his own master (53, 2): therefore, in that text, "not his own master" also denotes want of ownership, not merely the dependence of a son, slave, or the like; else it might be objected, that a gift by a stranger, not enumerated among void gifts, would be valid. But a "person who is not his own master" has been explained by authors "son, slave, or the like," not supposing that gifts might be made by strangers, but considering the possible doubt, whether, from near connection, the gift of a son, slave, or the like, be valid.

Dependence, declared in this text (15), shows that consent should be taken: consequently a gift made to the injury of the family, thereby deprived of subsistence, is *nevertheless* valid, and the receiver may dispose of the effects at pleasure; but the donor commits a sin, and therefore he shall be fined, and must perform strict expiation. Such is the construction according to JÍMÚTAVÁHANA, and maintained by many *Gauríyas*: and JÍMÚTAVÁHANA remarks on this point, that the father has power over precious stones and other *moveables* inherited from the grandfather; and that it does not appear immoral to give away immoveable property exceeding the subsistence of the family.

If it be alleged, that a contract made by a person not independent is invalid; and since a contract made by a person who is not his own master is void (54), since the father is not independent in regard to what has descended from the grandfather, therefore his contracts in general being invalid, surely his gift is null: a contract made by a younger brother receiving food only, being invalid, surely his gift is null; as contracts made by such a brother are not allowed by the wife, so it is declared, that a father has not

power to aliene the whole of his immoveable property (13): if this be alleged, it must be considered that "not independent" there means "not in his own power" (54); and a contract made by a person influenced by lust or the like, is void (53), because in this instance there is such a want of self-dominion, and that want of self-command prevents voluntary election. But that is not the case with a father in regard to wealth descended from the grandfather; for there is nothing to prevent his voluntary action. As for the instance of the invalidity of a contract made by a younger brother receiving food only, this must be understood of a case where the younger brother has consented *to subjection*, or, from minority or other cause, is incapable of proper choice. Therefore this text (15, 1) may be well explained as coinciding with that which directs that the other brothers should live under the eldest brother; and these texts having been otherwise explained, and the gift of wealth inherited from a grandfather not being included under the title of Void Gifts, the texts of YÁJNYAWALCYA (13) is considered as a *moral* prohibition of *such* gifts.

"The gift of a man's whole estate is valid; for it is made by the owner; "but the donor commits a moral offence, because he observes not the "prohibition." The *Smrĭtisára.*

On the validity of these gifts two opinions are set forth; the subject will be further discussed under the title of what may be given (Section II, Art. I).

In fact, men waste all their estate, and even their persons, on the *solemnities* at the birth of a son; but from the text which expresses "a wife is a friend in the house of the good," and from the advantage shown *in the married state*, greater affection is borne to the wife: the maintenance of her and of others being therefore requisite, how should a householder, destroying their subsistence, give his whole estate to another for civil purposes, unless he be insane or distempered? If the persons entitled to subsistence be not excessively vicious, and the householder, being mad, give away *his estate*, the donation is void; for a gift by an insane person is enumerated by NÁREDA among Void Gifts: but if those persons be excessively vicious, they forfeit their title to maintenance, and the donation may be valid even according to MISRA's opinion. But if he make the gift, thinking virtuous persons to be vicious; then, since the householder could not distinguish right from wrong, his gift is not valid. The whole subject should be similarly examined: and if at any time it be contested whether such a gift be valid or null, it must necessarily be then determined which opinion is best.

If a king give the whole of his dominions to his eldest son qualified for the empire, although his other sons be void of offence, the gift is valid, provided it be the act of a prince neither insane nor otherwise disqualified; for it is done in conformity with the practice of former kings (as shown in sacred and popular histories) without offence on the part of the other sons, or of their father. Thus DESARAT'HA* intended to commit his kingdom to RÁMA, in the presence of VAŚISHT'HA and many other Sages, and in presence of the citizens *at large*, although BHARATA and his other sons were faultless; but afterwards, excluding RÁMA and the rest, he gave his kingdom to BHARATA, as a boon to CAICÉYI.† Even now it is seen in practice, that entire kingdoms are severally held by one prince, although he have brothers.

* Fifty-fifth of the solar race. † Wife of DESARAT'HA.

Some, remarking the kingdom of AYÓDHYÁ was not divided, hold that kingdoms are indivisible on the authority of custom, although it be not expressly declared in the text of any Sage.* Though one kingdom may have been undivided, can the practice be grounded on the *Véda?* may it not have been some custom accidentally *established?* Let it not be said, that the consecration of the eldest son, to the exclusion of the rest, appears from the speech of VAŚISHT'HA in the *Rámáyana* of VÁLMÍCI.

"Among all the sons of ICSHWÁCU,† the first born is king: thou, son "of RAGHU,‡ are first born, and shalt this day be consecrated to "the empire.

2. "This prescriptive law in thy family thou canst not now reject, "O son of RAGHU! Rule like thy father, far famed prince, the "vast empire of the gem-producing earth."

The difficulty is removed by limiting this rule to the posterity of ICSHWÁCU; for he says, "among the sons of ICSHWÁCU," and adds, "in thy family." Shortly before *the passage quoted*, and after the curse *pronounced by* JÁBALI, VAŚISHT'HA says:

"JÁBALI knows the course of this world; he has said this, wishing to dissuade thee."

It is implied by this verse, that the Sages utter what is calculated to dissuade RÁMA from his intention of retiring to the forest, in compliance with his father's commands. It may therefore be said that the speech is adapted to dissuade RÁMA from his design of residing in the forest, and does not establish an *universal* law, that the first born shall take the kingdom. When RÁMA ascended to the abode of LACSHMÍ, his own sons, and the sons of his younger brothers, were severally consecrated to different portions of the empire: now RÁMA, wholly wise, and the instructor of mankind, did not act inconsistently with the law.

It should not be argued, that, among the descendants of ICSHWÁCU, the eldest may not have been *always* consecrated to the empire; but it was practised in the family of BHARATA:§ thus when PANDU retired to the forest, his kingdom, governed by DHRĬTARASHTRA,‖ fell under the domination of DURYÓDHANA; but, recovered by BHIMA, and his brothers, was enjoyed by YUDHISHT'HIRA, and not shared by his brethren: therefore a kingdom is indivisible. But the inauguration of the sons of LACSHMANA, mentioned in the *Rámáyana*, was not a consecration to the paternal kingdom, but to new dominons, given at the pleasure of the donor, and conquered by their father: thus the two sons of BHARATA were consecrated kings of *Gandharva*, conquered by BHARATA; the two sons of ŚATRUGHNA were consecrated kings of two cities founded in the forest of *Madhu*, which had been conquered by ŚATRUGHNA; and two cities, founded in the region of *Carapat'ha*, were given to the two sons of LACSHMANA.

* This digression is not altogether misplaced; for the great possessions, called Zemindaries in official language, are considered by modern *Hindu* lawyers as tributary principalities: and it might seem necessary to determine whether they be alienable and hereditable by the same rules with other landed property.

† Son of MENU, and first of the family named children of the son.

‡ Fifty-third of the solar race.

§ Twenty-second of the lunar race. ‖ The blind elder brother of PANDU.

The younger brother of RÁMA and the younger brothers of YUDHISHT'HIRA, *who were both* images of the supreme God and of deities, (*the first* born to slave RAVANA; *the latter*, to relieve the earth from *the* burden *of a multitude of tyrants;*) may have surrendered sovereign power, from respect to their elder brothers.

It is said, that the speech of YUDHISHT'HIRA to ARJUNA, in the *Mahábhárata*, is delivered with consideration of the respect due to ARJUNA and the other brothers, in the order of seniority:

"The brave BHÍMA-SENA is worthy of dominion: what is empire to "me, who am *thus* unmanned.

2. "I cannot bear these reproaches, which you utter in wrath: let BHÍMA be king; I wish not to live, O Hero! depressed as I now am."

In answer to the objection, how can YUDHISHT'HIRA, speaking from his own affliction, be affirmed to respect ARJUNA as next in seniority? It is added, that he acknowledged it on account of his dejection at his own unfitness for war; and there is no intention of denying the seniority of ARJUNA: accordingly the consecration of the five sons of YAYÁTI,* an ancestor of BHARATA, is mentioned in the *Herivanśa;* and the consecration of other princes, both in this and other families, is also mentioned in the *Herivanśa* and other works: such were NRĬGA, NARA, CRĬMI, SUVRATA and SIVI, sons of UŚINARA; VRĬSHADARBHA, SUBÍRA, CÉCAYA, and MADRA, sons of SIVI;† and MUDGALA, SRĬNJAYA, VRĬHADISHU, YÁVINARA, and CRIMILÁSWA, sons of VÁYÁSWA, and surnamed PANCHÁLA. The inference is denied; for there is no proof that a partition was made of their paternal kingdoms: and it is difficult to establish the great respect shown by LÁCSHMANA and the other *brothers of* RÁMA, by BHÍMA and other *brothers of* YUDHISHT'HIRA, by DUHSÁSANA and other *brothers of* DURYÓDHANA, and by *all* others *similarly circumstanced.* If BHÍMA, ARJUNA, and the rest, through respect alone, surrendered the empire to which they were entitled, why did they not yield their *common* wife DRAUPADÍ to YUDHISHT'HIRA alone?

But, in fact, a kingdom should be divided among virtuous brothers, able and willing to protect it; for Sages have not inserted kingdoms under the title of indivisible property. It does not become men born in these days to imitate the conduct of RÁMA, YUDHISHT'HIRA, and others, who were endued with immeasurable strength, courage, self-command, virtue and knowledge, and were attended by VAŚISHT'HA and other Sages. The speech in the *Rámáyana*, ("among all the sons of ICSHWÁCU, the first born is king, &c.") is adapted to dissuade RÁMA from retirement in the forest; for ŚATRUGHNA divided and gave to his sons the kingdom which he acquired in the forest of *Mad'hu.*

Let it not be objected, that, were it so, VAŚISHT'HA would be a liar: for, adverting to the fact, that the first happened, in *all* previous instances, to be consecrated to the empire, he mentions that fact. As it is not expressly declared that the sons of UŚINARA received the paternal kingdom, so it is not declared that they received any other than the paternal dominions. Consequently, there is no proof that a kingdom is indivisible: but those who are qualified to govern the realm, receive kingly power; and those who

* Fifth of the lunar race.

† Descendants of ANU, son of PURU, and to whom the north was allotted by that prince. In the *Bhágavata* four sons of UŚINARA are named. S'IVA, VARMA, S'AMI, and DACSHA.

have great qualifications abandon the paternal dominions and conquer other realms, but do not re-assume the hereditary empire. The government of the realm, the protection of subjects, and the payment of tribute by modern princes subject to a paramount sovereign, may, in this view of the settled usage, be determined with little *exertion of* intellect.

We infer from a passage of the *Adhyátma Rámáyana*,* "a son *who obeys not his father* is dirt," and another of the *Srí Bhágavata*, "it is thy father's command," that the son who refuses his assent to the father's gift of chattels, shall be restrained from such perverse conduct; nor is it questioned but he may have some share of the paternal effects. However, the history of kingdoms shows, that, to the exclusion of this son, one eminently endued with the virtue of justice, and other excellencies, is entitled to the royal authority. If the maxim, that a kingdom is indivisible, be not deduced from collections of law, still the kingdom would with difficulty be taken by all the brothers. Thus SÓMACA descended from the PANCHÁLA, had a hundred sons; and DRUPADA, son of PRÏSHATA, the youngest of those sons, is mentioned as king in the *Herivansa*: of the rest not even the names are recorded. In the *Rámáyana* of VÁLMICI, CAICÉYÍ thus addresses MANT'HARA, distressed at hearing the *intended* consecration of RÁMA:

"In RÁMA there is nothing inauspicious, nor is there malevolence in "his great soul: have no apprehensions, therefore, hearing of "RÁMA's consecration.

2. "A hundred years after RÁMA, BHARATA shall surely obtain, in "his turn, the kingdom of his ancestors."

Here is intimated the regular succession of brothers to the kingdom of their ancestors, nor their partition of the realm. Had she seen, or heard of, the partition of kingdoms, she would require for BHARATA a share of the dominions, not regular succession to the whole. It is evident that kingdoms in general were then indivisible.

Immediately after the passage quoted MANT'HARA replies:

"If RÁGHAVA† be king, his son, and after him another, and again "another decendant will be kings."

2. "CAICÉYÍ! BHARATA will be excluded from the royal race. All "the sons of kings do not remain in obedience to the eldest:

3. "But, of many sons, one only is consecrated to the empire. If "all were kings, it would be the highest injury:

4. "Therefore, spotless beauty, kings commit the affairs of government to their eldest sons, or to others more virtuous.

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* Ascribed to VYÁSA. The passage, to which this short quotation alludes, is a speech of RÁMA, in answer to the reproaches of CAICÉYÍ: "Say not so; I would give my life for my father; I would drink deadly poison; I would forsake my wife SÍTÁ *or* my mother CAUSALI; I would relinquish the empire. He who, unbidden, fulfils his father's wish, is first of sons; he who does so when commanded, holds a middle rank; he who, though bidden, complies not, is *vile as* dirt."

† *Rághava*; general patronymick of the posterity of RAGHU, but here restricted to RÁMA, as in the speech of VASISHT'HA to RÁMA, already quoted.

5. "Doubtless they consecrate to the empire the eldest *by birth or* "*excellence,* and never commit the entire kingdom to his brothers."

In answer to the supposition, that BHARATA might succeed after a hundred years, she says, "if RÁGHAVA (meaning RÁMA) be king, his son and remoter decendants will succeed; there will be no room for the inauguration of BHARATA: consequently thou arrest."* By this, CAICÉYÍ's supposition is not confirmed; *on the contrary,* the title of the middle brother to succeed after the death of his elder brother, although he leave a son, which, from what CAICÉYÍ had said, might have been inferred as founded on scripture, is refuted. "The succession of RÁMA's posterity will exclude BHARATA:" that is, no one of the decendants of BHARATA will be king. If BHARATA, obeying RÁMA be supported by him like a son, will he share the empire, or *ultimately* obtain the whole? In answer to this, it might be asked, do all the sons of kings obey the eldest? In fact they do not: therefore BHARATA will not long remain in obedience to RÁMA; nor will he be allowed to share the empire. "Even among many sons, one only is consecrated;" that is, all the sons do not share the empire: how then should a brother *obtain a share after the eldest has gained possession of the whole?* Usage, not the scripture, is the ground of consecrating one son only. This she intimates *in the third verse:* it would be an injury, if all were consecrated; that is, the empire would be impaired by division, or strife might arise between the brothers, should they reside in separate dominions. Therefore, "kings commit the affairs of government to the eldest son." May not the middlemost, or other son, be inaugurated? Since the eldest son, being first, cannot be passed over, his consecration is directed; but if he be vicious, another son, who is virtuous, may obtain the kingdom: consecration to empire is thus shown; therefore, *she adds,* the eldest son of RÁMA, and not BHARATA, will obtain the empire.

It should not be objected, that the speech of MANT'HARA is intended to excite discord, and is no authority. Such a disposition would not be excited in *the mind of* a hearer by the suggestions of a person speaking inconsistently with the reason of the law, with express ordinances, and with received usage: it may be affirmed, that the speech of MANT'HARA is not inconsistent with these three. It is consistent with the reason of the law; for she shows the argument of it: *and* it is consistent with settled usage; for VAŚISHT'HA subsequently declares, that, "among all the sons of ICSHWÁCU, the first born is king:" and the doubt above mentioned, whether the declaration of VAŚISHT'HA be restricted to the posterity of ICSHWÁCU, is obviated by the general assertion of MANT'HARA.

It should not be objected, that, were it so, the allotment of a divided kingdom to the two sons of ŚATRUGHNA would contradict that assertion: and it would be inconsistent with an express ordinance (Book V, v. 368); for, in the want of express texts of law, partition by a father ought to be made in the same mode with partition among heirs. If no contradiction be apprehended, there is nothing to prevent partition: and the reason of the law has more authority in judicial procedure than *the letter of* express ordinances. Thus MISRA says, "civil law is indeed founded on reason, not on revelation;" that is, he does not lay much stress on the *Véda* in judicial decisions, (for a text of the *Véda,* on partition by a father, is preserved by BAUDHÁYANA;) but establishes the superior authority of the reason of the law, in comparison with *the letter of* express ordinances.

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* This gloss is somewhat abridged from the original.

Some explain the second verse, "all the sons of kings do not retain life, when the eldest brother remains:" and they quote the remainder of MANT'HARÁ's speech.

"RÁMA and LACSHMANA are closely united *in mutal friendship*
"their brotherly affection, like *the union of* the *twin* sons of
"AŚWINÍ, is known to the world.*

2. "RÁMA, therefore, will in nothing injure LACSHMANA; but, doubt-
"less, he will injure BHARATA.

3. "Thy son, therefore, must hasten to the forest from thy mother's
"house: such must be his fate."

"RÁMA does not regard BHARATA, as he does LACSHMANA: the life of "thy son (now residing in his maternal grandmother's house) will there-"fore be attempted by RÁMA, when he has obtained the empire; and, to "save his life, BHARATA must retire to the forest." This they hold to be implied by this speech. But that exposition is wrong; for it would be a vain repetition of what had been already said, and would be spoken without cause.

Therefore, should a father, hearing these instances from the *Puránas* and other works, commit the kingdom to his eldest or other virtuous son, the gift must necessarily be considered as valid, *even* according to the opinions of MISRA and others: there is no difficulty in asserting, that the nullity of gifts, as mentioned by them, supposes cases other than *the gift of* a kingdom; for a different practice in respect of royal succession is mentioned in the *Rámáyana.*

Should he commit the kingdom to his daughter's son or other *remote heir,* although his *own* son be void of offence, then indeed it should be determined as is proposed; but, if he make a provision for the support of his other sons, and give his kingdom or other landed property to one son, then the gift is valid according to all opinions; for his family is not *thereby* deprived of subsistence. It is not proper to assert that he who has power to give away the person of his son, has not power to give away immoveable property without the assent of his son.

If, making a provision for sons void of offence, he give his kingdom to his daughter's son, or to a stranger, what is the rule in that case? The gift even of a kingdom is valid, as it is of *other* landed property; for no special prohibition, nor any such usage, is found in regard to kingdoms. But no father, who distinguishes right from wrong, would be so disposed.

If a king paramount, viewing the instances of kingdoms given by a father as abovementioned, give the whole kingdom to one brother, without intending an injury *to the rest,* he commits no offence, for he is equal to a father. But if the father die after giving away his kingdom, and the king paramount direct that it should be disposed of according to law; in this case, it does not appear consistent with the reason of the law, that one brother should take the whole, without the assent of the rest.

What is the "subsistence of the family," speaking of the sons of kings? As much as each consumes in food and apparel: not merely enough to

* Literally, "RÁMA is closely united to the son of SUMITRA; and LACSHMANA, to the descendant of RAGHU;" to avoid ambiguity, the patronymicks are omitted, and the phrase shortened.

support life; for, a man retiring to the forest may support life upon leaves, roots, fruit, and the like; and the subsistence of the family, mentioned by all Sages, would be unmeaning. But, should another of the king's son say, "needing as much food and as much raiment as this anointed brother, I give as much to the poor and helpless: these wants cannot be supplied *out of* that appanage;" his claim should not be admitted by the paramount: no other, not even his father, can be equal to that *consecrated brother;* for the law admits, *that a king is* a portion of *the divinity of* INDRA and other deities; and royalty obtains much reverence. Even *Bráhmanas* pronounce the praises of kings: *Bráhmanas* reverend themselves, even in the sight of deities; for, to them are duties committed; to them are the *Védas* intrusted; and to them is great favour shown by the supreme Ruler, because, contemning riches, they accept a subsistence on alms alone, in subjection to others. Thus, in the *Srí Bhágavata*, CRISHNA says of SANACHA and the rest:

"SRÍ,* for whose momentary regard others perform austerities, deserts not me, (though I need her not,) because I acquire merit from respect *shown* to these, the dust of whose lotos-like feet is holy, and who instantly remove every foulness."†

Though some modern priests are, in a certain degree, lessened by their misconduct, still great respect should be shown to them, in honour of former generations; and because it is said *by a deity* in another *Purána*, "a *Bráhmana*, learned or unlearned, is my body:" it is not proper that one bound to respect should notice the faults of a person to whom reverence is due.

From apprehension of offending very great persons, it is not *here* examined whether some modern princes, who are not independent in the government of their subjects, but merely employed in levying the revenue of the paramount, should, or should not, be acknowledged as kings.

16.

YÁJNYAWALCYA:—In distress for *the maintenance of* the family, *property* may be given away, except a wife or a son: but not the whole of a man's estate, if he have issue living; nor what he has promised to another.

What has been promised to one person in this form, "I will give it to thee," may not be given to another: but if the prior promise was made to a person not legally capable of receiving the gift, that it may be given to another; for a text (47) shows, that there is no danger in withholding what has been promised to a person incapable of receiving. It is observed in the *Retnácara*, on the text quoted (47), that want of religious qualification incapacitates for *the receipt of* gifts: this will hereafter be discussed.

What is the rule, if a man give to one what he has promised to another? MISRA says, every gift of what has been promised is invalid. This should be examined; for, whence is it deduced? *It is said*, from the texts of YÁJNYAWALCYA and others (16, &c.): but the obvious meaning of these texts forbids the gift, as it does the donation of a wife, a son, and so forth: and MISRA himself says, that civil law is founded on reason; in proof of which the text of VRÍHASPATI is quoted:

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* Abundance, or prosperity personified.

† According to the gloss of SWÁMY, which it is unnecessary to translate.

17.

VRIHASPATI:—A decision must not be made solely by having recourse to the letter of written codes: since, if no decision were made according to the reason of the law,* there might be a failure of justice.

And here, effects voluntarily promised by the owner not *immediately* becoming the property of another, the reason of the law is not applicable.

Should it not be established, that there is no independence in regard to what has been promised; and thus the gift is null, because it is made by a person who is not uncontrolled? No; for, in that instance, want of independence is not proved: the obvious sense of the texts of YÁJNYAWALCYA and others *merely* forbids the gift; and, in the title of void gifts, want of independence denotes want of ownership.

It is argued, that, from the term "not his own master," in the title of void gifts, it is not understood that he is not owner; but wherever the term "want of independence" is technically employed, every gift by such a person, who is not owner of the chattel, is void; for the text of MENU and YAMA declares null such a gift or sale *made by any other than the true owner* (Chap. II, v. 27); and sold is employed in the text of NÁREDA (Chap. II, v. 26) in the comprehensive sense of given, or otherwise aliened. Even a gift of his *own* paternal estate, by a pupil residing in the family of his teacher, may be void; or, if his want of independence in regard to his patrimony be not admitted, and a gift or alienation of wealth acquired by himself, or otherwise, be then made, by a son whose father is living, without the assent of the father or other *superior*, some part of MISRA's opinion should be admitted, though contrary to the opinion of JÍMÚTAVÁHANA: and as for what has been said, that want of independence, in respect of what has been promised, is not proved; *even* that is not established by the text of YÁJNYAWALCYA and others: thus, if he be independent, how should he be fined? The amercement for a gift of what has been promised to another, proves his want of independence; it is not consistent with common sense, that a man should be fined who gives that in respect of which he is uncontrolled: neither his want of ownership, understood from the term "want of independence," but subjection to another; and, in the dictionary of AMERA, independent, or his own master, is opposed to dependent, or subject to another: in like manner, a gift of female property by a wife, without the assent of her husband, is not valid; but the gift of female property by a wife, on a general permission to give *presents*, is valid; it is not required that the number or quantity be specified: but, for a gift of her husband's property, it is requisite that the number or quantity be specified in this form, "give so much wealth:" this distinction does exist; yet the term "exclusive dominion" is applied to female wealth; or the woman has exclusive dominion, as declared by the text, "the absolute exclusive dominion of women over nuptial gifts is perpetually celebrated:" and the same law is applicable even to other persons, who are technically described as "subject to control."

All this argument is contradicted, for even MISRA does not proceed to so great a length in regard to the separate property of a woman; and gifts of their own effects by subjects without the assent of the king, and by younger

* *Or according to immemorial usage;* for the word *Yucti* admits both senses.

brothers without the assent of the eldest brother, are seen in hundreds of instances.

Therefore, should a man give to one what he has promised to another, the last donee shall obtain the effects; but the king shall impose an amercement on the donor. It is not, however, expressly ordained, that an equivalent shall be given to the person to whom the promise was made. If the first promise be made for civil purposes, and the thing be afterwards given for religious uses, what is the law in that case? The answer is, NÁREDA, premising gifts for civil purposes (2, 2), and declaring unalienable what has been promised to another (4, 2), merely forbids the giving, for such purposes, what has been promised to another: it follows, that there is no offence in such a gift for religious uses, and that the gift is valid. But, in fact, should a man fraudulently give, for religious purposes, what has been promised to another, although he have other effects proper to be given, and do not satisfy the person to whom the promise was made, it is consistent with common sense that he should be amerced. This will be further examined in another place.

SECT. II.—*On Alienable Property, and on Valid or Irrevocable, and Invalid or Void Gifts.*

ART. I.—*On Alienable Property.*

18.

VRÌHASPATI:—A man may give what remains after the food and clothing of his family: the giver of more, *who leaves his family naked and unfed*, may taste honey at first, but shall afterwards find it poison.

2. Of houses and of land, acquired by any of the seven modes of acquisition, whatever is given away, should be delivered, distinguishing *land* as *it was* left by the father, or gained by the occupier himself:

3. At his pleasure he may give what himself acquired; a pledge must be disposed of by the law of pledges, *or subject to redemption;* but of property acquired by marriage, or inherited from ancestors, not every gift subsists.*

4. *But* if what is acquired by marriage, what has descended from an ancestor, or what has been gained by valour, be given with the assent of the wife, of the coheirs, or of the king, the gift has validity.

5. Heirs have a lien equally on the immoveable heritage, whether they be divided or undivided; and a single parcener has no power to give, pledge, or sell the whole.

The last text is attributed to VYÁSA by JÍMÚTAVÁHANA; and *herein* RAGHUNANDANA follows him. What exceeds the food and clothing required by the members of the family, who are entitled to maintenance as above

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* According to another interpretation, "the whole ought not to be aliened."

mentioned, may be given away. Otherwise, the family wanting food and clothing *in consequence of more being given*, the donor's conduct is not virtuous.

"There is sin in the gift of what does not exceed, and virtue in the gift of what does exceed, *the proper food and clothing of the family*." MISRA.

It is intimated, that what does not exceed the maintenance of the family, should not be given away, even for religious purposes; but it is also intimated, that the gift of what should be appropriated to the food and clothing of the family, is valid. "The giver of more may taste honey at first:" by this it is intimated, that bliss is at first obtained; thence it follows, that the religious purpose is accomplished; and that purpose cannot be accomplished unless the gift be valid: therefore the gift appears to be valid.

In the *Smrĭtisára* the validity of the donation is admitted: "a man's own gift is valid, because he has property, which is the established cause *of validity*." But it is not admitted that the religious purpose is attained; for he has not observed the commands of the law.

Some hold, since the text directs that a man should give what remains after feeding and clothing his family, and since it is not applied as an exception to the gift of more, therefore his duty is not fulfilled if he give not what exceeds the food and clothing of his family. But this does not seem proper; for the text relates to civil affairs, and it is irregular to ground on it a rule for *religious* gifts. A cause of failure in religious merit does not establish demerit. Thus, the bathing in the Ganges being accidentally accomplished, in neglect of advice not to go that way to the Ganges, by which was implied the danger of meeting tigers or the like, the religious purpose is *nevertheless* obtained: but it is not obtained by the gift of property belonging to another owner; for this is not a gift in the form of a relinquishment, vesting property in another after devesting his own.

According to the opinion of those who maintain the invalidity of the gift, the religious purpose is not obtained. But the expression "the giver may taste honey at first," is not taken literally. His conduct in delivering his whole estate into the hands of another may at first savour like honey, by affording mistaken pleasure, or causing present satisfaction; but afterwards it becomes poison, because it is punished in a region of torment. There is no difficulty in considering this as relating to civil gifts. But it may be applied indiscriminately to religious merit: otherwise, the gift or sale being sinful, but religious merit cancelling the sin, or himself not being born again, the religious merit of the donor would be inconsistent with his "afterwards finding it poison."

According to the opinion of MISRA, this text may imply the invalidity of a gift, where a man's whole estate is given; and, according to the opinion of JÍMÚTAVÁHANA, it may imply that the gift is valid.

19.

CÁTYÁYANA declares what may and may not be given:—Except his whole estate and his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, *whether fix or moveable*; otherwise it may not be given.

"His dwelling-house;" one house, without which he himself, or his family, might want a dwelling. It is meant generally, comprehending a pond supplying water for common use and the like.

Is not the excess above the subsistence of the family unmeaning, after excepting the whole of his estate? It should not be said, a gift of his whole estate might be made with a reservation of a single shell only. Were it so, his whole estate would be *an* unmeaning *exception*. Nor should it be said, the gift of the whole estate is excepted to prevent the possible gift of his whole estate by a man able to maintain his family on alms; for there is no authority for such an inference. It is not established, that a man able to subsist his family on alms, or the like, may not give away his whole estate: for it is the meaning of the ordinance, that the family should be anyhow supported.

Some observe, that a man, though able to maintain his family on alms or the like, ought not to give away his whole estate; for, should alms or other means at any time fail, his family might be distressed. Still, what can be understood from the expression his "whole estate?" The whole estate should be understood in the mode already mentioned; that is, the whole of his effects, including what is required for the maintenance of the family until other property be gained. Such a meaning is deduced from the sequel, "what remains after the food and clothing of his family." Or the excess above the maintenance of the family is expressly declared, *to provide* against the attempt of giving away even a trifle, when the family is but ill maintained out of the whole estate. Consequently, the gift even of a trifle, if it be not an excess above the subsistence of the family, is forbidden. Or the text may be read, "*sarvaswam griha varjitam*," instead of "*sarvaswa griha varjantu*." Consequently the whole of his own property (except his dwelling-house) that remains after the food and clothing of his family, a man may give away, such will be the sense *of the text*. "The whole" is there mentioned to show that moveables and immoveables are not distinguished. "His own;" by this term, deposits and the like are excepted: the sense is, his own several property; by which joint-property is also excepted. In concurrence with other Sages, a distinction must be understood in respect of a thing promised, a wife or a son. Here the condition *expressed* in the text concerning alienable property, that it must exceed the subsistence of the family, *shows*, that the gift of what does not exceed the subsistence of the family is not valid; and the declaration, that joint-property may not be given, *shows*, that the gift of several property is valid. As in the command for performing a *śráddha* at the conjunction, it appears, from the authority of the prohibition against performing a *śráddha* at night, that the *śráddha* or obsequies should be performed at the conjunction, but not at night; and that no benefit arises from a *śráddha* performed at night: so they hold MISRA's meaning to be similar.

Where the benefit *of an act* is deduced from the *Véda* alone, the means of obtaining that benefit are established in conformity with the rule commanding a time different from night; and the benefit is not obtained unless a time other than night be taken: for there is no ordinance showing benefit from a *Śráddha* performed without observing that distinction. But here the obligation of making gifts is deduced from the *Véda;* and a sufficient cause of property in the donee is found in the fact *of the gift;* but property cannot vest in another person, unless previous property be annulled: therefore, that being established, *the transfer of property* is established on the

intention of the donor to make a gift. By logical inference, gift being sufficient cause of annulling previous property, excess above the subsistence of the family cannot be *made* a condition by words alone, for perception arises from words and logical inference jointly; and it is difficult *to establish another opinion*. Such are the sentiments of those who follow the opinion of JÍMÚTAVÁHANA.

"By the seven modes of acquisition" (19, 2). The modes of acquiring wealth are declared by MENU.

20.

MENU:—There are seven virtuous means of acquiring property; succession, occupancy or donation, and purchase or exchange, conquest, lending at interest, husbandry or commerce, and acceptance of presents from respectable men.

The causes of gaining wealth *are these:* "Succession," or inheritance of property, as the term is explained in the *Viváda Retnácara* and *Viváda Chintámeni;* that is, property received in right of affinity and relation, "Occupancy," or gain; the finding of a waif or the like. "Conquest," explained in the *Retnácara*, victory over an enemy in battle. Consequently, what is gained by success in gaming, or the like, is excepted; it is a dishonest acquisition, for it partakes of the quality of darkness. The very same opinion is intimated in the *Chintámeni*.

Three, succession, occupancy, and purchase, are allowed to all classes; conquest is peculiar to the military tribe; lending at interest, and husbandry or commerce, belong to the mercantile profession; and acceptance of presents from respectable men, to the sacerdotal class. These are virtuous means of acquiring property: but, on failure of these, priests and the rest may subsist by other means allowed in times void of distress, such as husbandry and the like; or on failure of these, by the best modes allowed in times of distress. CULLÚCABHATTA.

21.

MENU:—Learning, art, work for wages, menial service, attendance on cattle, traffick, agriculture, content with little, alms, and receiving high interest on money, are ten modes of subsistence.

In the *commentator's* gloss, which follows the text above quoted, declaring these to be the mode of subsistence in times of distress, *he shows that* each of these modes of subsistence may be followed in times of distress by the person to whom it is forbidden in other circumstances: as work for wages, menial service, and the like, by a man of the sacerdotal class; and so of arts and the rest. "Learning," (except that contained in the scriptures, as medicine, philosophy, *charms* counteracting poison and the like, practiced for subsistence by all classes in times of distress, is no offence. "Art," as painting and the like. "Content with little;" for with content a man may subsist on his own, however little. "Receiving high interest on money;" lending on interest even in person, and so forth. By these ten modes a man may subsist in times of distress. Consequently a priest in *great* distress may depend even on menial service, arts, or the like, for his subsistence. Such is CULLÚCABHATTA's interpretation: but others argue, that, after declaring, in the first text (20), the modes of subsistence in

times void of distress, this text (21) intends the modes of subsistence in times of distress, implying the preservation of life *only*. That, however, in its consequences, coincides *with the opinion of* CULLÚCABHATTA.

But others *again* hold, that the practice of *Vaisyas* is allowed, by the following text, to a *Bráhmana* in times of distress; but is on no account *allowed* in other seasons: for, assisting to sacrifice, teaching the *Védas*, and receiving gifts and so forth, are declared to be the means of subsistence for a *Bráhmana*.

22.

MENU:—But a *Bráhmana*, unable to get a subsistence by either of those employments, *(his duties just mentioned, or the duty of a soldier,)* or a *Cshatriya, unable to subsist by his own occupations*, may subsist as a mercantile man, applying himself *in person* to tillage and attendance on cattle.*

And here it is irregular to give such an interpretation to this text (21); for it is declared, that the modes of subsistence delivered in the tenth Chapter are legal in times of distress: "Such as have been fully declared are the several duties of the four classes in distress for subsistence:" and the virtuous modes of subsistence for a *Bráhmana* in such circumstances are declared in the text *first quoted* (20); since the modes of subsistence for a priest alone are declared, beginning with the text, "Should a *Bráhmana* afflicted and pining through want of food choose rather to remain fixed in the path of his own duty, than to adopt the practice of *Vaisyas*, let him act in this manner," and ending with this text (20). Immediately after it, the modes of subsistence for a *Cshatriya* in distress are delivered in the text quoted (21); and, next to that, a distinction is declared in regard to interest on loans, which both texts permit the *Bráhmana* and the *Cshatriya* to receive.

23.

MENU:—Neither a priest, nor a military man, should receive interest on loans: but each of them, if he please, may pay small interest, for some pious use, to the sinful man who demands it.

Immediately after this text, the proper subsistence of a *Cshatriya*, in times of distress, is particularly mentioned; as the proper subsistence for the *Bráhmana*, in such seasons, is mentioned in the texts, "Should a *Bráhmana*, afflicted and pining through want of food, &c." But in all these texts a *Vaisya* is not even named; and a *Śúdra* is subsequently noticed: how then can the text, "there are seven virtuous means, &c.," (20) relate to the four classes? The answer is, YÁJNYAWALCYA has in many places delivered a text applicable to the *Cshatriya*, and similarly describing ten modes of subsistence.

24.

YÁJNYAWALCYA:—Agriculture, art, work for wages, science, receiving high interest on money, *the use of a* carriage *retirement in*

* See MENU, Chap. X, v. 82. In quoting the text, the compiler has omitted the question, and inserted the words "but a *Bráhmana* or a *Cshatriya*:" on this reading, it has been necessary to interpolate the text, because both employments are not allowed to the *Cshatriya*.

mountains, service of kings, *the office of* king, and alms, are modes of subsistence in times of distress.

Before this he declares the subsistence of a *Bráhmana* in times of distress.

25.

YÁJNYAWALCYA :—A priest, *when* oppressed by calamity, eating food received from any man whomsoever, is not tainted by sin; for he is equal to the igneous sun.

Therefore the text, "There are seven virtuous means of acquiring property" (20), describes the virtuous means of subsistence for a *Bráhmana* in times of distress; and the text, "Science, art, &c." (21), describes the virtuous means of subsistence for a *Cshatriya* in such circumstances: and there is no vain repetition in *twice mentioning* lending at interest, and husbandry or commerce, explained by CHANDÉSWARA, VÁCHESPATI, MISRA and CULLÚCABHATTA, receiving high interest on money, and agriculture or traffick.

It should not be objected, that conquest and the like cannot be virtuous means of acquisition for a *Bráhmana:* for MENU declares, that the highest beatitude may be attained by *Bráhmanas* practising, in times of distress, the duties propounded for *Cshatriyas* and the rest.

26.

MENU :—Such as have been fully declared are the several duties of the four classes in distress for subsistence; and if they perform them exactly, they shall attain the highest beatitude.

This opinion should be well examined.

It seems to be declared by the text of VRĬHASPATI (18, 2), that property partaking of the qualities of passion and darkness is unalienable. CHANDÉSWARA makes no remark on this point. But MISRA says, "the expression is comprehensive: he may aliene, at his own pleasure, his own several property anyhow possessed; but property, *held* in coparcenary with another, cannot be aliened without the consent of the coparcener." MISRA's meaning is, that the words of VRĬHASPATI, *who was* profoundly versed in the law, intend property legally acquired, and do except any *several* property from unalienable things, but do not except from alienation property acquired by other than those seven means.

As for the distinction declared by NÁREDA in regard to property partaking of *the qualities of* truth, passion and darkness, the ranking of usury and the like under the quality of darkness is pertinent, as it relates to *Bráhmanas* and the rest in times void of distress.

27.

NÁREDA :—*What is* acquired by *teaching* the *Védas,* by courage, or devotion; *what is received* with a damsel, from a pupil, or for a sacrifice; and *what is* obtained by inheritance, are celebrated by Sages as the seven-fold *distinction of* pure property.

2. What is gained by usury, agriculture and traffick, or *received* as tolls or as wages for singing, or *as a return* for a benefit conferred, is considered as property partaking of the quality of passion.

3. What is acquired by servile attendance, by gaming, by robbery, by *inflicting* pain, by disguise, by larceny, and by fraud, is considered as partaking of the quality of darkness.

Whatever *several* property, acquired by any of these modes, is given away, even that was alienable; and the same should be observed of property acquired by art and the like (21), and so in other cases. Such exactly is MISRA's meaning.

" Houses and land, acquired by any of the seven modes of acquisition" (18, 2), is an expression used comprehensively. In the case of other moveable or immoveable property, if land, a house, or the like, be given away, it should not be resumed: this the Sage intends to express. Consequently, should chattels deposited, or the like, be given away, the gift should be retracted. Such is the whole meaning. " As it was left by the father or gained by the occupier himself," is subjoined to limit the rule; and is elucidated by the next verse (18, 3). Such is the consistent method of authors.

But others explain acquisition, the means by which wealth is gained; intending property acquired by the means described in texts which show virtuous and other modes, such as purchase and the like. Those several means, in which an act of the receiver is requisite for the acquisition, must be considered as the seven modes: and one is included in another; as robbery, larceny, the business of usury, and so forth. Consequently the number of seven is not contradicted. Left by the father signifies inheritance only; and gained by the occupier denotes the receipt of gifts and the like; it is meant of cases where no act of the receiver in expectation of gain is necessary to the acquisition: and property partaking of the qualities of passion or darkness, is, without difficulty, comprehended in the text.

A distinction is propounded (18, 3) relative to property acquired by the occupier himself, which the former text had declared alienable. What is acquired by a donee, without relation to another, may be given at his pleasure, even without the assent of sons, brothers, and the rest: and the distinction is derived from the text quoted by JÍMÚTAVÁHANA (14). Immoveable property, as land or the like, and a corrody in the form of a fixed allowance, payable by the king or other person, and bipeds or slaves and the rest, a man shall neither give away nor sell, even though he acquired them himself, without the consent of all his sons. Such is the sense *of the text* (14).

Is a bird unalienable or not? Since it appears from the word " biped," that even a bird may not be given without *the* assent *of heirs*, should it not be *held* unalienable? No; for VRĬHASPATI shows that a decision inconsistent with the reason of the law must be avoided (17). On immoveable property, such as land or corrodies, children may be long subsisted. As it causes unlimited production of wealth, it is called an estate, or *funds of support:* the loss of it is pronounced dishonourable in a text of NÁREDA (12); and the gift of it, without the assent of sons and others using the estate, is called loss in *this* text. Now a slave is such; for, by agriculture or the like he is able to gain much wealth for his master. It should not be objected,

that great riches be acquired even by receiving high interest on gold or the like. Though *gold*, lent at a high rate of interest, may be equal to immoveable property, *affording wealth* like the alchymist's stone, or like the gem which daily produces gold, yet, if it be not lent at interest, there is nothing to prevent alienation. Or it may be understood, that if a contract be made for interest, *then gold or the like*, producing wealth by means of that contract, should not be given away. If that be the case, may not wealth be acquired, in some instances, even by means of birds; for example, by the advanced price on birds well taught? This should not be granted: were it so, the same might be extended even to quadrupeds, such as sheep and the like, and bulls or other animals employed in husbandry. If it be argued, that land, a corrody, or the like, may be understood to be declared in the text by the word "immoveable;" and slave, bird, or the like, by the word "biped:" (for it is a rule not to strain a text; and when the literal sense of the terms suffices, there is no occasion for recurring to the reason of the law; and the text of VṚIHASPATI *therefore* is not applicable in this instance:) the answer is, dissimilar rules in respect of birds and sheep, entitled to equal consideration, would be inconsistent with common sense. *Men of* some mixed classes subsist by the exhibition of snakes; should they give one away without the consent of their sons, it would appear to be a loss of the estate: yet a snake is not a biped. Since the sons and the rest *of the family* might be maintained, even after giving away a snake, by catching another, may it not be said that there is no loss of estate? The same might be alleged in regard to a gift of land by *Bráhmanas* and others. As land is dependant on the king, may not the sons and others recover it, and thus be exempt from difficulties? Be it anyhow in this instance; but those who subsist by the exhibition of apes may fail in catching another, and *thus* be reduced to difficulties, for by labour must this end be attained; and it cannot be accomplished without much toil in the display of science, *and exertion of art*. On this subject it is said, whatever mode of subsistence long maintains persons of a *particular* class, even that is their real estate, *and* is intended by the word "immoveable;" biped literally signifies a bird, a man, &c. and these may not be given without the consent of *the donor's* sons. This finally is the sense.

It is argued that particular birds, being valuable bipeds, and slaves, being endued with excellent qualities and the like, may not be aliened without the consent of sons. It should not be objected, that a thing *sold* for any price may be valuable. Whatever bears a greater price, compared with other things of the same nature, is costly. Nor should it be objected; in comparison with what must it bear a higher price? If it be said, in comparison with any bird; then, even what does not commonly bear a great price, may be dear in comparison with a bird accidentally sold for a less sum: and thus, that *only* is cheap, in comparison with which no bird has borne a less price; and all others are dear: and, since low-priced birds may be scarce, or all may be valuable, such great refinement would be fruitless. A very high price may be distinguished, with the king's consent, by comparison with the cost of birds accepted by persons in general; and so in other cases. This exposition may be questioned; for, great value is not implied, by the reason of the law, in declaring immoveable property and the like to be unalienable. Thus it is not consistent with approved usage, that, by a comparison with land measuring twenty cubits, deemed valuable in comparison with the quantity of a *pala* of gold, land measuring a single cubit should be aliened at the pleasure of the occupier alone. This and other points may be discussed in many ways.

"A pledge must be disposed of by the law of pledges" (18, 3). As his own interest *in the pledge,* such should he make another's. The *Retnácara.*

The meaning is this: any man pawning a chattel, receives a loan from some person; if the creditor give that pledge to *another* person, then the gift of the pawn is the same with a gift of the debt: therefore, as the debtor paying his debt to his creditor might redeem the chattel, so, in this instance, paying the debt to the donee he recovers the chattel. It is mentioned to make it evident that a debt *demandable* may be given away or sold. In fact it is included in what may be given at pleasure. Consequently, if a pledge be received for a loan of paternal wealth, it is subject to the law concerning patrimony; but if it be received for a loan of what was acquired by the man himself, it is subject to the same law with his own acquired property. Thus some expound the law. MISRA explains this clearly. The form *of transferring a pledge* is subjoined, "this thing was pledged to me, and is given by me to thee; it must be restored by thee to the owner, on receiving the amount for which it was pledged."

But others hold, that, in the case abovementioned, when a debtor gives to any person a chattel which is in pawn, then the donee may obtain that chattel after payment of the debt: that is, as the debtor had an interest, or restricted property, in the thing pawned, so has the donee; and after the death of the donor, on failure of his sons or other successors to his estate, should the creditor or his issue be living, the donee: wishing to obtain the pledge, may receive it on payment of the debt. This in effect follows from what has been said; for, unless payment of the debt be the condition, there would be no restriction to property in the pledge: and RAGHUNANDANA observes, in the *Dáyabhága tatwa,* that, "if the pawn remain unredeemed on the death of the seller or donor, then, since a property similar to that of the contracting party has been vested by sale or gift, the buyer or donee should redeem the pawn." Here, if the chattel pledged belong to the paternal estate, it is subject to the law respecting patrimony; but if it were acquired by the man himself, it is subject to the law concerning such property.

In these two opinions a mutual contradiction arises; that is, after a gift or sale of a pledge by a fraudulent debtor, on his death, and on failure of sons or other heirs, the payment of the debt by the donee or purchaser *according to one opinion,* or non-payment of it *according to another,* is *in either case* an *unjust* disparity. The question may be thus discussed: in regard to the donee, be it as it may be; but a purchaser, having paid a fair price, would suffer great loss if he must again pay the debt with interest, which would be inconsistent with common sense: therefore he may obtain the pledge without payment of the debt; and such a rule being equitable in the case of a purchase, the same may be established in the case of donation. It should not be objected, that the loss falling on the creditor, who advanced his own money, and long preserved another's chattel, would be inconsistent with common sense: a similar loss falls on the creditor, after the death of the debtor, if the pledge have been destroyed by the act of GOD or the king, or by the fault of the debtor. Nor should it be objected, that, where a thing already transferred to another is sold, the loss falls on the purchaser: the debtor has not transferred the thing *to his creditor.* Nor should it be objected, that, in this instance, the pledge is not destroyed by the act of GOD or the king: the sale of the pledge is a fault on the part of the debtor, *by which the pledge may be lost to the creditor.*

28.

Smriti, quoted by CHANDÉSWARA and RAGHUNANDANA:—If a man, having bailed or pledged a thing to one person, pledge or sell it to another, the last act shall prevail.

Otherwise, since the mortgage is cancelled by the redemption of it, there may be no obstacle to a valid gift or sale, even though a mortgage prevail. It should not be objected, that, supposing it to prevail, should a gift or sale be made after it, that contract would not be valid, even though the pledge be subsequently redeemed; for it is resisted by the mortgage, which was in full force when the gift or sale was made: but now, such a contract, made while a mortgage subsists, is valid, and the donee or buyer may dispose of the thing at pleasure, when it has been redeemed; and thus should the force of donation or sale be admitted. Then it would be proper to say, that, both being good in law, both have equal force. As a depositary cannot withhold from the purchaser a chattel, which had been bailed to him to be kept ten months, and which is afterwards sold within that period, so a mortgage is cancelled by the *superior* force of a sale: therefore the purchaser can take the chattel from the creditor; and the debt remains unsecured by a pledge. But if the purchaser bought the chattel, knowing it *to be mortgage*, he must necessarily be punished by the king; else, from the state of the times, established usage in regard to loans would be now infringed by the audacity of knaves. Contracts of sale, mortgage, and the like, must necessarily be made in the presence of the king's officers, and should be recorded by them. Yet if they were not present, but another person, who was by, prove the contract, the predominance of a sale, where mortgage is opposed to it, is declared by RAGHUNANDANA himself: "what has *superior* force, even that is good in law." But here mortgage resists the owner's *power of* disposing of his effects at pleasure, and is not preceded by the annulling of property: and therefore, whether prior or subsequent, it is superseded by donation or purchase, which are preceded by the annulling of the former owner's property, and have *superior* force. By the word "even," in the phrase "even that is good in law," the invalidity of a weaker contract is intimated: and here the mortgage, as a weaker contract, being invalid, what should prevent the purchaser obtaining possession of that which is now become his own?

If it be said, since the expression 'mortgage resists the owner's power of disposing of his effects at pleasure,' intimates an opposition to gift, sale, consumption, and many other modes of disposal; therefore a sale, though valid while a mortgage subsists, does not authorize the purchaser, now *become* owner, to dispose of the thing at pleasure: it is answered, the sale would not then be valid. Nor is this apprehended by RAGHUNANDANA; for it would disagree with prior and subsequent works *of the same author*: therefore, opposition to disposal at pleasure is *effected by* restraining a debtor, who attempts such an act, by means of the king's officer; not by preventing a purchaser, who is not liable for the debt, from disposing of the thing at pleasure. But the purchaser should see the thing, and *have reason to* suppose it is not pledged to any man when he pays a price *for it*, else he is punishable; such is the induction of common sense: and he should obtain immediate possession; for the sale may become void through want of possession during a long space of time, and the mortgage would then be *exclusively* valid.

In this instance, the creditor obtains another pledge from the debtor; or the debt should be immediately discharged. If the debtor die, the creditor may receive it from his son or grandson, or he may recover it from any other property whatever left by the debtor: he cannot withhold that pledge from the purchaser; for no ordinance *permits it.*

RAGHUNANDANA remarks on the text above quoted (28), that the word 'sell' *also* denotes gift annulling property. Consequently gift, sale, barter, and all other *contracts* devesting property are intended.

The moderns hold, that if a man sell a valuable pledge for less than its worth, *that is,* less by the amount which is applicable to the redemption of the pledge, and with an agreement in this form, "on redeeming the pledge, thou shalt have it;" or if he make a gift or other alienation, with the same stipulation; then the pledge should be redeemed by the purchaser or donee, in conformity with the text of YÁJNYAWALCYA (Chapter II, v. 28). But in regard to pledges, since the owner's property subsists, it appears that there is a distinction. Thus, where two contracts of *gift and* acceptance occur, since the property of the former owner is devested by the first donation, the gift last made by him is not valid, for it is made without ownership; and so in regard to sale. But this is actually the foundation of validity in the gift or sale of a thing bailed or pledged, as *declared* in the text *lately quoted* (28): therefore, should the same thing be hypothecated to two creditors, the validity of the last mortgage cannot be reversed, for it is made by the owner; and the validity of the former hypothecation being admitted, because it was also made by the owner, they may be equally good; but the first has not superior force, since a decision inconsistent with the reason of the law is forbidden by VRĬHASPATI (17). Therefore, even in a contract of mortgage, some distinction respecting the property in the effects must necessarily be admitted, under the authority of which even the purchaser of those effects may not dispose of them at pleasure before the mortgage is redeemed. Such is the sentiment of RAGHUNANDANA.

What is the distinction? Not a specifick difference inherent in property: for such a difference cannot be therein admitted, fluctuating with the variations of time; since specifick difference constitutes permanent species, and species is not regulated by time, produced with the production of substance, and destroyed with its destruction. Nor can another property arise therein; for there is a want of the requisites *to constitute a title.* Let it not be argued that the distinction is individual, because the *Mímánsacas* do not acknowledge genus and species separate from substance. There is no proof of such individual distinction.

It is said, the intention *of the parties* constitutes the distinction. Thus, when a thing is pledged, the debtor intends, and expresses in words, "let this chattel, belonging to me, remain with him; until the period expire, it shall not be enjoyed by me or my relations:" and therefore, by virtue of that *declared* intention, even a purchaser, like the debtor's heir, is debarred from the enjoyment of that chattel. *Thus* established usage in regard to loan and payment would not be infringed. Otherwise, no man would make a loan, apprehending that the debtor would sell to another what he pledged to him.

If it be said, as a bailment, made by the owner for a specifick period of ten months, is cancelled by a subsequent contract of sale; and setting aside the former owner's intention, (that it should remain with the deposi-

tary to the end of ten months), it must be delivered at the will of the present owner: so, even in this case, setting aside the act of the former owner's will, it must be delivered at the pleasure of the present owner; else the enjoyment of chattels pledged by a herdsman's wife, as authorized by her former lord, might subsist without the assent of her second husband: the answer is, the intention of a bailment made for safe custody only has little force, and is consequently superceded by the stronger will of the actual owner; and therefore delivery is proper in that case: but here, the intention of a pledge, being inferred from the loan, retains its force until the loan be repaid; and therefore it is not superceded: and the enjoyment of a thing pledged by a herdsman's wife, being authorized by her former lord, is honest.

This is confirmed by the opinion of RAGHUNANDANA: and the author of the *Mitácshará* in effect admits the debtor's ownership in the pledge. According to the modern opinion, when a thing is twice hypothecated, the predominancy of the first hypothecation is founded on the pledge not being relinquished by the creditor who has received it.

From the text cited in Book I, (v. 271), it appears that the produce of a thing held by one creditor is applicable to the payment of the debt due to him, although the debtor have the ownership of it: or what has been artfully obtained by a creditor from his debtor, is applicable to the payment *of the debt due* to that creditor, not to any other. In this case, if a loan have been advanced on a pledge, the first lender is considered as entitled to the thing, not the last creditor. But this lender cannot be said to have a stronger title than a purchaser; for no ordinance declares it. By adequate punishment inflicted *in such instances* on the buyer and seller, the king may relieve the fears of lenders.

"Property acquired by marriage" (18, 3), supposes also what is gained by valour. Not every gift, with or without consent, subsists: therefore gifts of those three kinds of property, as mentioned in the subsequent text, must be made with reference to *the consent of* others. *Retnácara.*

The meaning is, that the terms of the text denote, *that* the assent of another, as well as the assent of the giver, *is required.*

MISRA explains "property inherited from ancestors," immoveable property which has not been divided. Consequently, the immoveable patrimony, received by brethren in right of their connexion *or affinity* as sons or the like, may not, so long as it remain undivided, be given by one son without the assent of the rest: the commentator does not consider gift as forbidden, when there are no brothers who are coparceners, and there are brothers and sons with whom partition has been made. If it be asked whence *the limitation of* "immoveable" is obtained, *the answer is*, from the text of VYÁSA (Chap. II, v. 6). If it be *again* asked whence *the limitation of* "undivided" is obtained, *the answer is*, from the text of NÁREDA (6). Therefore MISRA does not say, that a father may not give *anything* without the assent of his sons: as we shall hereafter show.

"Do not subsist" (18, 3) denotes the nonentity of every gift *(that is, some do, and some do not subsist)*; such is MISRA's meaning. And in the subsequent text (19, 4) it is declared, that if those three respectively (what is acquired by marriage, &c.,) be given with the assent of the wife, of the co-heirs, or of the king respectively, the gift has validity: for it is a rule, that things named in order, should be referred respectively to the terms placed in similar order; as in the example, he cuts a *D'hava*, and a *C'hadira* tree, with a bill and an axe.

CCC

"Acquired by marriage;" what is received at nuptials on obtaining a bride. There the rule bears, that the assent of the wife is required when the property is given away by the husband, not when it is employed in procuring raiment or the like for consumption; since that would be a moral construction of law. Civil law is founded on reason, not on revelation *only;* for it may rest on another possible foundation: accordingly VRĬHASPATI directs that decisions shall be made according to the reason of the law (17). MISRA.

Here the expression "at nuptials," is employed comprehensively; for the rule bears, that even what is afterwards given, with a declaration, "this is bestowed on thee, that my daughter may be maintained with it," should not be given away by the husband without the assent of his wife. What is given with a declaration of its uses for the maintenance of the wife, becomes the property of the husband concurrently with her: therefore it is fit that gift should be made with her consent. In other cases, his property is independent of her: what should prevent a gift without reference to her consent?

If it be said, the husband's gift is in no case proper without the assent of the wife, because the text, "property is common to the husband and wife," shows her title in the whole of his wealth, and should not be otherwise explained without an objection *existing to its literal interpretation:* that is denied, because the wife's property must be inferior, as it is subordinate to the husband's; and the right of persons living under the control of others, cannot prevent the devesting of the property appertaining to the persons under whom they live.

May not the wife's title subsist although the thing be given away, for her property is not devested? It should not be answered, the wife's property, being dependent on the husband's, should be considered as annulled when his title is transferred. Were it so, his right being devested by his death, and the property vested in the sons, their mother would not be entitled to a share, in right of her former property, when they afterwards make a partition. *To this it is replied,* that the difficulty is removed by saying, the mother's title to a share is not founded on her former property, but on positive texts; and if it be wished to interpret the text according to the reason of the law, the vesting and devesting of the property cannot be established without *the support of* an express ordinance: but, under the authority of the text, and by the force of the possessor's will to make a gift, the devesting of the husband's property is accompanied by a transfer of the wife's. However, the devesting of his property by death or degradation is excluded from this consideration. Thus must the law be interpreted.

According to the opinion of JÍMÚTAVÁHANA and others, (who contend that the wife is not entitled to the estate of her husband who leaves no male issue,) food and raiment must necessarily be given to her, although her husband's brothers succeed to the whole estate: that alone is her right; but she cannot claim partition with his brothers, for no ordinance *has authorised it:* and, since women are dependent on men, surely their property must be so likewise.

Since the husband's wealth is common to him and his wife, it is joint-property; and if it be given away by the husband, her share, *nevertheless,* subsists, as in the case of joint-property belonging to two brothers. This *again* is denied; *for, in practice,* that is considered as joint-property in which there is equal right on both sides. Hence, even those who contend

for the equal dominion of a father and son over an estate inherited from the paternal grandfather, do not affirm that the son's share in it subsists if it be given away by the father alone, for he has not joint-ownership with the father. The term is derived from equality: but that estate does not equally belong to the father and son; for one is superior. The expression "equal dominion," is vague, intended to prevent the father acting *solely* at *his own* pleasure in the partition of the heritage: it is founded on connexion by birth, which common sense does not make equal; and it must be established that the son's claim in right of affinity is included in the father's. Admitting, with JÍMÚTAVÁHANA, dispersed property, *still* the son's right must be considered as the same with the father's, being referred to the same quarter. Hence, in a partition made by the father, no share is given to a grandson whose *own* father is living.

There is no dispute on the opinion of those who hold that the text which declares wealth common to the husband and wife, implies only the expenditure of his property in honouring guests, not a right vested in her. But it is irregular to interpret a text otherwise, without unfitness *in its literal sense*: and we hold it proper, that the wife's co-operation should be required in civil contracts, as in religious acts; under the text, "The wife is declared to be half the body of her husband, equally sharing the fruit of pure and impure acts" (Book V, v. 399); and again, "Then only is a man perfect when he consists of *three persons united*, his wife, himself and his son" (Book V, v. 252, 4.)

"For that would be a moral construction of law" (gloss of MISRA above quoted); the *Smriti*, which is founded on the reason of the law, relates to visible effects, grounded on authority, other than *moral* precepts, but deducible from reasoning: but, whether the reason of the law does not appear, there, as the authority of it must of course be sought, effects are supposed which proceed from the *Véda* alone, an authority independent of life; and such effects, in some instances pure, in others sinful, are unseen, *or metaphysical*. If this text imply immorality, a difficulty would arise from the additional necessity of establishing an unseen *or moral cause*, contrary to the immorality declared to arise from those ill actions, and independent of the declared effects of the moral cause mentioned. Such is the sense of MISRA's remark. The unseen *or moral consequences* of irregular conduct are declared: by discriminating the degree of irregularity, crimes of several degrees result from one general expression; penance must be performed accordingly, and punishment must be proportioned to penance: but, in this text, reasoning, not morality, is shown. Such is MISRA's meaning: to expatiate would be superfluous.

Should not scripture be established as the foundation of the system of law, declaring it to be founded on scripture; but not independent of reason? Reasoning is not obviously denoted by the text; therefore he says, civil law is founded on reason: but rules concerning lunar days, and the like, are absolutely founded on scripture. How then is law called *Smriti?* Sounds, which were heard from the utterance of the Supreme Being, are called *Śruti;* they are the *Védas;* and these names are interchangeable. Words which were delivered by holy Sages from recollection of the sense, after forgetting the words revealed by the Supreme Being, or even while remembering them, are called *Smriti*. If recollection of the sense of the *Védas* be not admitted as its foundation, how can it be called *Smriti?* The answer is, reason is not the *sole* foundation of civil law, but scripture also in some instances,

accordingly a text of scripture concerning partition during the father's life-time, is adduced by the holy Sage BAUD'HÁYANA. But MISRA has said, "it is founded on reason," because reasoning abounds. In the law concerning lunar days and the like, scripture abounds; and reasoning is only sometimes employed. Again: property is a thing founded on scripture; for, without it, the vesting and devesting of property could not be proved: hence, the conveyance and transfer of it being proved from the scripture generally, it has been established by Sages, from the reason of the law, that effects bailed cannot be given away; that joint-property is unalienable without the assent of the other proprietors; and that several property may be aliened at the sole pleasure of the owner, and so forth.

"For law may rest on another possible foundation" (gloss of MISRA above quoted): since the words of holy Sages are words of living *men*, they have not authority of themselves. It is true in reasoning, that one alone has authority in the universe: HE, BY WHOSE WILL THE UNIVERSE IS GOVERNED. But it does not follow that the words of Sages have no cogency, for they are void of deception and other faults. Hence the words of Sages, not cogent in themselves, nor yet destitute of authority, derive it from another *source*. It is not proper to affirm this source to be the Sage's eye, ear, or other organ of sense. Property and the like, which are things invisible, future, and remote, cannot be apprehended by the eye, ear, or other organ of sense. Nor should it be said, that Sages see everything with the eye of absorbed contemplation; for it cannot be admitted that any other than GOD sees all things. It should therefore be affirmed, that the system of law has been propounded by legislators viewing the sense of the *Védas*; else, there can be no other radical authority for the words of Sages. A knowledge of the sense of the *Védas* being established as the foundation of the whole system of law, wherever *a particular* rule may be grounded on a sense deducible from the reason of the law, there another authority may exist; and it is not actually founded on the knowledge of the meaning of the *Védas*. This should be established as the implied sense of the term "rest on" or be caused: "a decision must not be made solely by having recourse to the letter of written codes" (18); if it cannot be made in conformity both with the reason of the law and the letter of written codes, the decision should be made according to the reason of the law alone.

What is received from the maternal grandfather, must not be considered as having descended from ancestors, but as acquired by the man himself.

"Be given with the assent of the wife, &c." (18, 4). The gift should not be made without her consent. Is not that which must be given with the assent of the wife, and which has been previously described by the term "acquired by marriage," the exclusive property of the woman, and nowise appertaining to her husband? Therefore, the husband having no power to give it away, what purpose is there in her assent?

29.

VYÁSA:—What shall be given *to a bride* at the time of her nuptials, with a declaration *of its use, made by the giver* to the bridegroom, shall be her entire property, and shall not be shared by her kindred.

Though it be the exclusive property of the woman, still the gift *made* with her assent is valid, for it is authorized by the owner; and this is implied by the expression "with the assent of the wife, of the coheirs, or of

the king." *To this it is answered*, were it so, it would be superfluous *to declare, that* what is acquired by marriage *may be given* with the assent of the wife; for, in all cases, a gift made with the assent of the owner is valid.

In the text of VYÁSA, bridegroom in the dative necessarily implies that he is the donee; that property is the bridegroom's, not the bride's: by declaring it her entire property, it is understood that she has an interest in it, which implies that a gift must be attended with her consent. This is denied; for another authentick text, quoted by JÍMÚTAVÁHANA, shows that the *legal* heirs of her exclusive property succeed thereto.

30.

VYÁSA:—What, *indeed*, shall be given *at any time* to the husband in trust for *his wife*, the daughter *of the giver* shall enure to her use, whether her lord live or die; and on her death, to the use of her issue.

Hence, JÍMÚTAVÁHANA makes it evident that it is the bride's property. It intends what is given to the bridegroom, with a declaration, "this shall be the bride's;" not *what is given* without this declaration. "At the time of her nuptials" is mentioned illustratively; it is not a *requisite* condition, since the declaration *of its use* is the cause of *its becoming female* property. Therefore such a gift belongs exclusively to the woman: but the construction of law, as delivered by MISRA, that "even what is received by an independent bridegroom, at the time of the nuptials, without such a declaration, may not be given without the assent of the wife," is incongruous. To this it is replied, what is given with a declaration "this shall be the bride's," is her exclusive property; but in that which is given to the bridegroom with a declaration "it is my intention that the bride's maintenance should be *secured* by this," the bridegroom has ownership, but with reference to the *consent of his* wife. This is intended by MISRA, and consequently there is no inconsistency.

But if a declaration be made *in these words*, "this shall be the bride's," her husband is not the donee, and he should not be named in the dative. It must not be argued that the dative case denotes the agent's object, as in the example "she sleeps with her husband." The object, *or intention*, "this shall be the bride's," has no relation to the bridegroom. SRÍCRISHNA-TERCÁLANCÁRA explains "what is given to the bridegroom," what is delivered into his hands. But others explain "declaration," a notification that "it shall be the bride's property:" consequently the gift is made to the bridegroom, but contemplates the property of the bride: and where the design of the gift is that the property shall be the husband's in trust for his wife, it becomes her property through the medium of his, and belongs exclusively to her by the authority of the text.

In fact, the gift of every sort of property acquired by marriage, must, under this text, be made with *a previous* reference to the wife; as the assent of the king *is required* for *a gift of* arms, horses, elephants, and the like, conquered in war: and it may be affirmed, that the rule is assumed from the reason of the law, grounded on the wife's interest *in the chattel*. The justness of one opinion, (MISRA'S, or these), should be thoroughly examined.

With the assent "of the coheirs" (18, 4); meaning undivided brethren and the rest. MISRA.

"Of the king" (18, 4). He in whose army a man combats is the *king or* lord: in giving wealth gained by valour, his assent is required.

VÁCHESPATI MISRA notices a distinction: the king's consent is required for a gift of arms, horses, elephants, and the like, gained by valour or by victory in battle; for his ownership is supposed: but *it is* not *required* for *a gift of* clothes or the like; for they are supposed to devolve on the conqueror's men. Others hold, that, in regard to the surrender of his cities by the conquered king, and in regard to horses and the like seized by the enemy and given by the victorious prince, the concurrence of the conquered king is required. VÁCHESPATI MISRA does not accede to this last opinion; for he has not explained this contradiction.

"The gift has validity" (18, 4): but not without the assent of the wife, of the coheirs, or of the king.

"Heirs, *whether they be divided or* undivided, &c.;" brethren and others of right receiving the heritage of him whose inheritance they take. MISRA states the import of the term "divided;" although heirs have made a partition, their shares, if not separated, remain in common, and are consequently joint-property. In that case a single parcener has no power to give, pledge, or sell the whole. But if all the effects be separate, the act of a person who is his own master is valid. In effect this relates to cases where no partition *has been made.* It must be noticed, that since those *shares* appear virtually to be held in common, the sense of the text shows that joint-property may not be given. CHANDÉSWARA, from the derivation of the term (*dáyamádatté*, takes the heritage), explains *dáyáda* or *heir*, a son or the like; (as the *Calpateru*, in a gloss on the text of APASTAMBA, expresses "heir, son, or the like;" and the author of the *Pracása* also explains the term in the singular number). Consequently he concurs with MISRA: thus "heir" *signifies* "son;" to the question "whose sons?" the answer is, "his from whom the estate has descended:" hence the brothers of the donee are virtually suggested by the terms of the text. Consequently all the sons of the original proprietor are equal owners: hence no one has power to give away the joint-property; he has not the independent power requisite to the validity of his act. VÁCHESPATI MISRA states this opinion of CHANDÉSWARA *in these words*: "others hold that the term heir chiefly intends son: while the father lives, "even a separated son has not power over the immoveable estate; but what "he has acquired by the acceptance of gifts, and the rest of the seven modes "of acquisition, he may give away." Consequently, while the father remains, sons, with whom no partition has been made, have not power over the immoveable estate; and while he lives, they are not uncontrolled in receiving, aliening, and dissipating property. The texts have the same foundation: but in that text the dependence of undivided heirs, in regard even to moveable effects, is further denoted, and it shows that separated sons have not power over immoveable property.

Some expound the phrase "heirs or sons have a lien equally" (18, 5), they are owners equally with their father: accordingly it appears from the text of YÁJNYAWALCYA (13), that the father has not power to give away immoveable property without the assent of his sons; and that is actually declared by the legislator (14): and this text they hold to have the same import.

Concisely the settled rule is this: joint-property, which has descended from ancestors, can *only* be given away with the consent of the other parceners; divided moveables *may be aliened* at the owner's pleasure, but immoveables with the consent of those who were parceners before partition: in the case of wealth acquired by marriage, the assent of the wife is requisite;

of other property, acquired by a man himself, a gift may be made at his own pleasure. Such is the opinion of CHANDÉSWARA, and also of VÁCHESPATI MISRA; but the assent of the wife is only required for what has been given to the bridegroom, with a declaration, "let this be the bride's," and not in every instance of property acquired by marriage: and there is this difference; *according to the last opinion*, the assent of the rest of the brethern is not required for a gift of divided immoveable property. In the former opinion there is *also* this difference: what has descended from ancestors must *only* be given with the assent of sons; and so must immoveable property acquired by a man himself.

CHANDÉSWARA has not clearly explained, that, if the ordinance be infringed, the gift is void. In the want of an able exposition on the words "the gift has validity" (18, 4), it is inferred that the gift is not valid *in other cases*. It is the opinion of VÁCHESPATI MISRA, that the gift is void; for, in a gloss on "divided or undivided" (18, 4), he states, "but, after partition, a gift made by an independent person is valid."

JÍMÚTAVÁHANA says, "a gift made by the owner, not disqualified by "insanity or the like, is in no case void; the gift is valid to the amount of his own share even of landed property." The wife's gift of property belonging to the husband to whom she is united, has not been considered by any modern author: the discussion *of this point* may be seen in Book V, On Inheritance.

The text, "at his pleasure he may give what himself acquired" (18, 3), is not restricted to property other than immoveables: but it applies to whatever *the owner* himself acquired, whether moveable or immoveable; for there is no authority for any restriction. Such is CHANDÉSWARA's opinion: but it may be objected, that a limitation might be deduced from the text cited by JÍMÚTAVÁHANA and others (14).

Declaring vâlid the gift of property acquired by a man himself, or inherited from his father (18, 2), the Sage declares the moral purity of gift, "at his pleasure he may give, &c." (18, 3). Consequently there is no reference to the assent of any person; and a gift actually made is morally pure. But of property acquired by marriage, or inherited from ancestors and not divided, the whole ought not to be aliened. Such is the sense *of the text* (19, 3). For, the bride having ownership in what is given with a declaration of her property, the bridegroom is not independent in regard to it: but, if it be given with a declaration only of its use for her maintenance, a gift *of such property* made by the husband is valid. For this purpose it is said, not every gift subsists, *or the whole ought not to be aliened* (18, 3). In regard to what has descended from an ancestor and is undivided, a gift of the whole made by one parcener is not valid; but the gift of his own share is good in law. The Sage declares the form of validity in gifts (18, 4): the whole property acquired by marriage, or inherited from an ancestor, given with the assent of the wife, or of all the coheirs, is a valid gift: since the king's favour concurs to the ownership of property acquired by valour, even a trifle given without his consent is not a valid gift; for, without his consent, the occupier has no independence. Such is the sense of the text: and that is proper, because the king maintains the army for the sake of victory in war; hence, what is conquered by the troops, of right belongs to the king, else the ownership of territory conquered by his forces would be shared. Or, what distinction is there in respect to clothes, horses and elephants, territory and the like? As to what is gained by desperate

valour, as well as by valour *generally* (Book V, v. 360), even there it appears that the king's assent is requisite to enjoyment, to gift, and the like. But the king, anyhow informed, gives immediate mental assent: instances of *formal* consent are not much seen in practice.

In regard to immoveable property inherited from an ancestor, the assent of brothers and the rest, who, though separated, may ultimately be entitled to a partition of it, is the cause of moral purity by the gift: but the donation is not void without their assent, for that is not denoted by the text. As to the inference, that the gift is void, because disability is denoted by the expression "has no power" (18, 5), it is inadmissable; for, the disability may be otherwise effected: thus, when an heir, though divided, forbids the gift or sale of immoveable property inherited from an ancestor, the occupier cannot give it in contempt of that prohibition. Such is the sense of the words "has no power;" and practice also conforms therewith.

A gift of immoveable property, made by a father without the assent of his sons, is valid: but he should be amerced, and must perform penance; for their equal dominion is propounded under the title of Inheritance.

31.

YÁJNYAWALCYA:—Over land acquired by the grandfather, over a corrody *out of mines or the like settled on him and his heirs by the king,* and over slaves employed in his husbandry, the father and the son, *when the grandfather dies,* have equal dominion.*

And that is pertinent, as it relates to inheritance; else, sons could not have ownership while the father lives: but to affirm that the right is similar would be *mere* childish prate. At present, the title becomes similar after partition, as is shown in Book V, On Inheritance; and the texts of VISHNU and others conform it: but a gift by a father under the impulse of anger, or the like, is not valid. Such is the modern opinion: no one has expressly said, that the immoveable patrimony, given without the assent of sons and the rest, is not a valid gift. Even the king should not, in breach of the law, give immoveable property for civil purposes; but he may give land or the like for religious uses: so may any other owner give away his own property for such uses; it is not proper, in this instance, to discriminate moveable and immoveable property: the family, however, should not be distressed, as appears from a text cited by JÍMÚTAVÁHANA (11).

From the rule, that 'evil is not the consequence of an act producing good, and consistent with the *Védas*, provided the act be different from incantations to destroy enemies and the like,' some infer, that sin is the consequence of a gift of property, when there was no excess above the *necessary* subsistence of the family, *(this being comprehended in that vague exception;)* hence the rule of decision in this instance is similar to that which regulates gifts for civil purposes: but those who are able speedily to acquire wealth, perform the *costly* sacrifice *Viswajit*,† or the like.

32.

YÁJNYAWALCYA:—Let the acceptance be publick, especially of immoveable property: *and,* delivering what may be given and has been promised, let not a wise man resume the donation.

* Book V, v. 92.

† MENU, Chap. XI, v. 75.

"Publick;" in the presence of witnesses; let him so act that he may not afterwards say, "this was not given by me, but entrusted for use."

"Especially of immoveable property:" a gift of land, without the assent of sons and the rest, is not consonant to duty; therefore arbitrators may think it has the appearance of *a contract* not made: kinsmen, even though divided, may litigate; and absolute property is ascertained by possession for twice the period which confirms *a right to* moveable effects: these and many other obstacles exist in regard to land; it is therefore said, "especially *the acceptance* of immoveable property."

A written contract of gift is proper; in the want of that, the donation should be attested. The contract should be written with the donor's own hand; and, in these times, it should be witnessed: else a litigant, averring that it was obtained by compulsion, may render the writing vain. The witness should be a kinsman, a publick officer, or other principal person; for an authentick text declares:

33.

Land is conveyed by six formalities, by the assent of townsmen, of kindred, of neighbours, and of heirs, and by the delivery of gold, and of water.

Literally "of the town;" meaning the rational inhabitants of the place. "Kindred;" persons who might eventually be entitled to the heritage after the giver's *male* issue, namely daughter's sons and the rest. "The lord," the king, or his substitute, or any king's officer employed for the purpose. "Heirs," sons and the rest. *Land is conveyed* with the assent of these; that is, with their acknowledgment of knowing the gift, or with their attestation: but the author of the *Mitácsharà* says, the gift should be made after they have assented. By "town," according to him, is meant the king's officer residing in the town: his assent is required to ascertain the boundary; else, the gift may be *either* void or immoral, *(according to the difference of opinion on that point,)* because it may include the joint-property of others. By "kindred," *according to him*, are meant brothers, and the rest: without their assent, a gift is defective, as already shown. By "lord" is meant the king; his assent is required, because subjects are dependant (15, 2): in a gift of land, the assent of him by whose will it is held, and by whose favour the encroachments of others are prevented, is indeed proper. By "heirs" are meant sons; their assent is required by the text cited in the preceding section (14). "A delivery of gold" with land, for the purpose of showing a complete gift, is proof of donation. "Water" is delivered with *tila* and *cusa*, for the auspiciousness of the gift. And thus a donation of immoveable property for religious uses is excellent; but, for civil purposes, a gift of immoveable property should not be made by prudent men: this is a settled rule.

By proceeding so far, great difficulty would arise in gifts of landed property for civil purposes. But, when the townsmen and the rest are witnesses to the contract, there is no controversy. If, by accident, they be not witnesses, their assent should be noticed in the deed of gift, and the written contract should be made in the same form with a written contract of loan; for the directions of YÁJNYAWALCYA are general. (Book I, v. 16).

The form of the writing should be this: in place of the creditor's name, let the donee's be written, and the names of his father and so forth, to pre-

vent a mistake of the person; next should be written, "this deed of gift, *as follows:* for the sake of heaven I give unto thee, with gold and water, this land, measuring so much, and exceeding the *necessary* subsistence of my family, *to be* held for such a period." If the townsmen and the rest be not witnesses to the deed, or if they be not present, the instrument should express, "with the approbation of the king, and with the assent of sons," and so forth. Though the consent of sons be not required in a gift for religious purposes, it should nevertheless be noticed, (on account of the difficult publicity of a gift of immoveable property, which has been remarked by Sages), that himself and his descendants may not claim ownership. The year, month, fortnight, and day should be noted; and the donor should subscribe his name with his own hand, first writing the designation of his father and so forth. The names of witnesses, informed of the whole contents, may be subscribed by another hand, after asking *their permission;* but the writer's name *must be added.* If any party be unable to write, *the instrument* should be subscribed by a substitute: but the donor, if unable to write, makes some mark, as a double line, or the like. Such is the practice.

A contract written by the party himself, even though not attested, is *good* evidence; but, if attested, it is indisputable: and therefore it is proper to make it *in that form.* But if there be not the attestation of kinsmen and the rest, then it must certainly be questioned by the king. Such should be the written contract of gift for the whole of joint-property: in grants by a king there is some difference.

34.

YÁJNYAWALCYA:—Let a king, having given land or assigned a corrody, cause his gift to be written, for the information of good princes, who will succeed him,

2. Either on prepared silk, or on a plate of copper, sealed above with his own signet. Having described his ancestors and himself,

3. The quantity of the gift, with the penalty of resumption, and set his own hand to it, and specified the time, let him render his donation firm.

"A corrody;" the gift of a thing assigned on a fund. "For the information of good and just princes;" not of unjust princes, for they indeed violate even written grants. How should the writing be framed? He says, "on prepared silk," or (because that is not durable) "on a plate of copper." "The gift;" the land or thing which is granted. *Having described the* quantity of it; "its quantity so much." Declaring the consequence of resuming a gift. Setting his own hand to it; "what is here written has the assent of me, son of such a one:" with such words subscribed, and with the date affixed; that is, the date of his reign, or the time of an eclipse of the moon, or the like. By the assent of the king, the donation should be rendered firm.

The consequence of resuming a gift is thus shown.

35.

Ádi purána:—The giver of land remains in heaven sixty thousand years; but he who resumes it, or assents *to the resumption,* shall so long inhabit a region of torment.

In the *Dípacalicá*, a corrody is thus explained : the gift of a future thing by a previous agreement, in this form, " I will give a hundred *suvernas* every month of *Cártica*," or, " out of this mine, or this village, I will annually give a hundred *suvernas*," or, " I will monthly give one *suverna*."

How can there be property in a future thing; for it has not, at that time, a place on which to rest; and the act of volition ceases after creating the right. Neither is *it true, that* a future thing *is* not given, but only promised: were it so, after the death of that king, on the accession of his successor, the corrody would be lost. Nor should this be deemed admissible; for it is inconsistent with *the practice of* respectable men. *To this it is replied,* that the past existence of volition is the cause of *this* property: hence the *Bráhmana* has a right to the future thing; and, should another king resume *the grant,* he falls to a region of torment for seizing holy property. The gift of a corrody is at once completed; but it should be inserted in the written grant, " I will give a hundred *suvernas* every *Cártica*."

If property is not created in a future thing, why is the partition of a corrody discussed? The word itself justifies its futurity, and implies volition; and the term " gift" is extended to corrody for the purpose of confirming it, like the sale or transfer of a debt. The grant of the pension should be prefaced with these words : " this written grant of a corrody."

" For the information of good princes :" else a prince, though good, might resume it through ignorance or doubt; a bad prince would *probably* resume it knowingly. To denote this, the epithet good is added. This is meant generally. A consequence of the grant is the spreading of the donor's fame: accordingly, an authentick text, cited by GÓVÍCHANDRA, expresses :

36.

So long as his fame, unforgotten, pervade the earth and air, shall the generous man remain in a celestial abode.

It is related in the *Máhabhárata*, that, having performed many virtuous acts, and enjoyed heaven during a very long period, the king INDRADYUMNA, falling *from heaven* when almost all his contemporaries were dead, though *the merits of* his virtuous deeds were yet unexhausted, asked of the Sage MARCANDÉYA the story of his fame: but he, though he had lived long, being unable to relate it, referred him to one born before himself; that person also unable to relate the story, did the same : this series *of reference* being continued, a turtle in the lake of the DÁNAVAS rehearsed the whole history of INDRADYUMNA. By this his fame, before extinguished, again blazed, and by its own effulgence caused the king INDRADYUMNA to ascend to heaven.

As prepared silk is not very durable, a plate of copper is directed. According to the thing to be given, a particular leaf *or plate may be used.* Copper is here mentioned for its purity and auspiciousness : this is meant generally, comprehending silver and the like.

" His own signet;" a thing used to stamp at once the whole of the letters in an uniform mode: the letters may be those which express his name, or others, but such as cannot be used by another person.

" His ancestors;" the race from which he sprung; his own ancestors born of that race : for the purpose of spreading their fame with his own, and to prevent the mistake of another person bearing the same appellation.

"Himself:" since it is customary to insert the name of the donee and the rest, and since his own appellation is actually inserted from the necessity of observing the form of a written contract of debt, or is inserted because it is engraved on the seal, something more must be *here* meant; and that appears to be his own titles of honour: though it be improper to exalt and celebrate himself, such praise is not improper from his own dependents. Thus some explain the texts: but others hold, that, since he is dignified by spiritual persons with titles of honour, it is proper to insert them.

"Describing the quantity" of land, in this form, "land measuring so many cubits." In fact its description by time and place should be inserted: however, that is not shown in the text of YÁJNYAWALCYA (34), but *is inferred* from practice: it is usual to insert the *name of the* town and the like.

"The penalty of resumption:" the consequence of resuming what has been given, as has been mentioned; and another authentick text, *cited* in the *Dípacalicá, denounces the penalty.*

37.

But he who seizes the subsistence of priests, whether given by himself or by another, is born a reptile in ordure for sixty-thousand years.

It is shown by texts cited in the *Ecádeśí tatwa* (38 and 39), that a man seizing holy property is guilty of a *crime equal to* the murder of a priest; and, seizing the property of a *Cshatriya* and the rest, *he is guilty of a crime equal to* the murder of a soldier and so forth.

38.

Váyu purána:—Since property is called external life, he who takes it slays the owner.

39.

SANC'HA:—He who resumes the subsistence of any man, of what tribe soever, must perform the expiation prescribed for killing a person of that tribe.

40.

HÁRÍTA:—He who gives not what he has promised, and he who takes back what he has given, sinks to various regions of torment, and springs again to birth from the womb of some brute animal.

These and many other consequences from resumption of gift have been propounded; for the sake of illustration, a little has been inserted *in this place.* Many fruits *accruing* from the gift of land, have also been mentioned by Sages.

41.

But he who accepts land, and he who bestows it, performs pure acts, and shall certainly go to a region of bliss.

And "the giver of the land obtains landed-property,"* and so forth; but that is not mentioned by YÁJNYAWALCYA.

* MENU, Chápter IV, v. 230.

As the direction for the king's subscribing the grant with his own hand may be fulfilled in any words, some explain it, that he should only write with his own hand, "so much land given to such a person." They think it ill-reasoned *to require* the words "this deed of gift," as practised by his officers.

"The date;" 'his own' is brought forward; consequently the sense is, the king should execute the deed of gift dated by the year described from the reigns of princes of the same dynasty. His titles, and the denunciation against the resumption of gift, *should* be placed above, and on the left side; for it is customary to put the name of the giver on the right side. Let him render his donation firm, that it may have long duration. Thus some explain the text (34).

A deed of gift, or the grant of a corrody, should be thus framed in the form directed for a written contract of debt; it is separately mentioned, for the additional direction of a seal and the like. This gloss is grounded on the *Dípacalicá*.

Since the priest, as well as the king, has property in the soil occupied by the subject, (for he is declared by MENU to have dominion over the human species, Chap. II, v. 24), and since the priest's lordship of the soil is proved by the practice delivered in the system of law (Chap. II, v. 13), and since MENU declares it (42), and since the priest is entitled to a share in the produce of agriculture (43), how is it again bestowed on him?

42.

MENU:—The *Bráhmana* eats but his own food, wears but his own apparel, and bestows but his own in alms: through the benevolence of the *Bráhmana*, indeed, other mortals enjoy life.

43.

PARÁŚARA:—Giving a sixth part to the king, a twenty-first to deities, and a thirtieth to priests, *a husbandman* is exempt from all sins *incident to agriculture.*

To the question above stated it is answered, that *dominion* is expressed in a general sense; as a priest is not qualified for war, he has not superior ownership: and even admitting the priest's lordship of the soil, a gift may be *nevertheless* made to him for the purpose of entitling him also to receive the share due as revenue to the king.

MENU forbids the levying of revenue from a field occupied by a priest; for, otherwise, the text quoted in Chapter II (v. 14, 7) would be unmeaning. But subjects, even though residing on land appertaining to a priest, must be protected by the king; and the fines imposed on them should be received by the sovereign.

If some river be described as the boundary, and the quantity of land be specified, then, should the river encroach on it, the loss falls on the priest, because his land is destroyed; as it is his loss if gold received by him be stolen by robbers. But if the river assigned as the boundary should recede, the land gained by alluvion belongs to the king; because the gift did not intend that land, and it exceeds the quantity *specified.* But where the quantity is not specified, and the grant expresses, "the land as far as the river is thine; what is carried away by the river is thy loss, what is left by

the river is thy gain;" then the loss or the gain, *whichever it be*, is the priest's.

It must be considered, that if present volition, by its privation,* become the cause of future property in a future thing, present volition, by its privation, may also become the cause of future property in a present thing: as in the case of a gift, in this or other form, "this field belonging to me shall be thine after my death," the act of volition, which constitutes gift, is past at that very time. The increase of purity, *attainable by gift*, is *gained* on that day *which is* hallowed *by the donation*: but the property *of the giver* is not devested; nor *is it* vested *in the donee*, until after *the giver's* demise. His donation is indisputable, because it does not differ from relinquishment, vesting property in another after devesting his own property. It should not be objected, that the past existence of volition is not seen to be a cause of property: it is necessary to establish it in the case of corrody; and authors admit the gift of a future thing.

When a debtor pays the debt which he has contracted, by *assigning* something which will exist on a subsequent day, then, the debt being acquitted on that very day, interest ceases; and that future thing becomes the property of the creditor, and cannot be taken by another. A debtor, desiring to conciliate the regard of his creditor, may voluntarily add, and give, a quarter, or half of that, and so forth, to a creditor eager for interest. In this case the form of the writing *must be regulated accordingly*: if YÁJNYADATTA, having borrowed ten *suvernas* from DEVADATTA, on the tenth day of *Ashád'ha*, discharge *the sum* on the eleventh day, with *an advance* of a quarter, the form of the writing is this: "I, having received a loan from "thee, on the tenth day of *Ashád'ha*, (to discharge that together with "interest voluntarily stipulated, and amounting to a fourth part of the "principal for a single day,) do give unto thee grain to the value of twelve "*suvernas* and a half, at the *current* price of the month of *Pausha*, to be "received from the produce of this field in the present year." If the produce of several years be assigned, it should be thus stated, "from the produce of this field for so many years." But if the writing bear "for the present year," and grain be not produced that season, the amount should again be made a debt, for it is not in fact discharged: the will to transfer property has alone passed, but the creditor has obtained none: therefore the debt must be again paid. Where a debtor, intending to pay the debt when due, has carried the sum from his own house with the will that it should become the creditor's property, but in the meantime the money is lost by accident; as in this case it must be paid again, so in the other case likewise: for there is equally a want of delivery; and, according to VÁCHESPATI BHATTÁCHÁRYA, there is an equal want of property. The payment is complete on actual delivery; not on a mental relinquishment only.

If he receive a loan from another, pledging to him the produce of that field, then the last creditor shall have the surplus produce; he does not in this case take a share. If there be no surplus, the debt is similar to one unsecured by a pledge; and the last creditor shall be paid from other assets, for he has no pawn. But, if the prior contract were an hypothecation, then, according to RAGHUNANDANA, the first creditor must obtain his principal and interest by any other mode whatsoever, and relinquish the pledge: according to other opinions, the last creditor only shall take the produce; but the first creditor shall receive interest from the date of the second con-

* Alluding to the relation between cause and effects.

tract, at the rate of two in the hundred or the like, for his pledge was lost to him on that date. This and other points may be determined from a man's own judgment. CÁTYÁYANA declares, with a distinction, what has been said by YÁJNYAWALCYA, that what has been promised should be given (16).

44.

CÁTYÁYANA:—He who delivers not a present which he has promised to a priest, shall be compelled to pay it as a debt, and incurs the first amercement.

By this expression, "as a debt," even beating and the like are permitted; but it is incompatible with common sense that the claimant should beat debtors of the sacerdotal class: it appears, therefore, that the king should employ *compulsory* means for the recovery of the debt. In fact he may compel payment by mild remonstrance and the like: it is mentioned to show the absolute necessity of payment. Prudent men do not make *absolute* promises; but intending to give anything, they say, "GOD willing, the purpose shall be accomplished."

From the mention of a priest in this text, some lawyers doubt whether it relate not to the promise of a gift for religious uses. But that is not right; for, in the case of a promise for civil purposes, the delivery of the gift is also necessary. It has been declared, that, in the case of a promise for such purposes, what has been promised is unalienable (4, 2).

45.

Matsya purána:—If a man give not what he has *legally* promised, let the king fine him one *suverna*, or *eighty* racticas *of gold*.

The contradiction between the fine of one *suverna* and the first amercement (45 and 44), should be reconciled by distinguishing the case according to the virtuous or vicious disposition of the party.

YÁJNYAWALCYA has said, "let not a wise man resume the gift" (32); there, resumption is of two kinds, refusing to deliver what has been given, and taking it back after delivery: the fine is the same, for they are *like* a pair of horses coupled in one yoke; and no other fine has been mentioned. HÁRÍTA declares the offence equal (40 and 46).

46.

HÁRÍTA:—A promise *legally* made in words, but not performed in deed, is a debt of conscience both in this world and the next.

"Various regions of torment" (40); the hells named *Raurava, Mahárau-rava, &c.* What* is promised in words expressing "I will give," but not actually given, is a debt (46). How can it be a debt; for it is received from him by reason of a promise, *not by reason of a loan?* The legislator replies, it is a debt of conscience. From the words "in this world," it appears that payment should be enforced by the king; from the expression "in the next world," it appears that the promise-breaker sinks to a region of torment. Some infer, from the mention of debt, and from the exposition on a text *cited in Book* V, at v. 111, (to those to whom payment has been promised by the father,) that what has been promised should be so paid by his son.

* MENU, Chapter IV, v. 88.

All this supposes a promise of what may be given ; but it does not apply to the promise of what is unalienable. Under the directions for an amercement where such property is given away, the king should not impose a fine, *at the same time* compelling the performance of an undue act ; nor should he omit to punish such an act. Therefore, half the amercement for giving what is unalienable is incurred by promising what should not be given ; or the king should compel the man to pay as much as he has promised, but has not delivered : two punishments existing for the same offence, the lightest should be preferred.

In some instances it is directed not to give what has been promised.

47.

GÓTAMA :—A man shall not give, even what he has promised, to a person whom the law declares incapable of receiving.

His want of religious qualification is here the cause of his not being entitled to the gift. *Virida Retnácara* and *Vivida Chintámeni.*

48.

MENU :—Should money or goods be given, *or promised as a gift,* by one man to another who asks it for some religious act, the gift shall be void if that act be not afterwards performed :

2. If the money be delivered, and the receiver, through pride or avarice, refuse *in that case* to return it, he shall be fined one *suverna* by the king, as a punishment for his theft.

Money or goods given, or promised, by one man to another who asks it for a sacrifice, should he not afterwards apply it to that purpose, shall be taken back if given, and shall not be delivered if promised *only.*

CULLÚCABHATTA.

If the donor give money to a priest for a sacrifice which he himself requires, and the priest, not performing that duty, apply it to his own use, at his own pleasure, then the money may be withdrawn : but it must not be resumed, if the man, asking it *in these words,* "I perform a sacrifice for myself, give me *this* money or *these* goods," and receiving the money or goods, do not perform the religious ceremony. Thus some interpret the law : but that is not satisfactory ; for his asking it would not be the consideration. Therefore, the construction is this : 'to another, who asks it for some religious act ;' that is, to a person who asks it, *at the same time* saying, "I will perform an act of religion."

According to CULÚCABHATTA, the sense of GÓTAMA's text is, "what he has promised to a person not qualified on religious *grounds* ;" according to the *Retnácara,* it is, "promised to a person disqualified on religious grounds." Both should be admitted ; for a person not qualified, *or disqualified* on religious grounds, is incapable of a gift for religious purposes, since texts declare "marble transports not marble *over the deep ;*" and again, "*wealth should not be* distributed among women, nor among ignorant or dishonest men :" and this must be understood of cases where religious qualifications were supposed at the time of the promise, as will be mentioned (62, 3). But if wages, or the like, be the motives of the gift, the donor must deliver it even to a man not qualified on religious grounds.

The circumstance of his not applying what has been promised, to the religious use *intended*, may be known by *publick* report; for instance, some person declares, " this man, taking money or goods on this account, gives it to a harlot." If the receiver do not *in that case* surrender what has been given, or if he forcibly take what has been promised, he shall be fined one *suverna* by the king, and shall certainly be compelled to restore the thing. " As a punishment for his theft;" since it is thus declared that he shall be punished as a thief, *it does not appear* that he should be made to restore it by mild remonstrance and the like.

ART. II.—*On Valid or Irrevocable Gifts.*

49.

VRĬHASPATI :—Things once delivered on the following eight accounts cannot be resumed, as wages, for *the* pleasure *of hearing poets or musicians and the like,* as the price of goods sold, as a nuptial gift to a bride *or her family,* as an acknowledgement to a benefactor, as a present to a worthy man, from natural affection, or from friendship.

" As wages;" as a recompense paid for work performed: so CHANDÉSWARA, with whom MISRA concurs. Sacrificial fees might, according to this exposition, be deemed wages; but the grounds on which they are not considered as such in forensick affairs, may be learned under the title of Non-payment of Wages or Hire.

" For pleasure;" for *the gratification of seeing* dancers and the like.
MISRA and CHANDÉSWARA.

" As the price of goods," paid to the vender. " As a nuptial gift or gratuity," delivered to the person who gives the bride; so explained by MISRA and CHANDÉSWARA: a nuptial gratuity is paid at an *'Asura* marriage;* and the pair of kine delivered at an *'Arsha* marriage, though not *strictly* a gratuity, is comprehended in this term. " As an acknowledgement to a benefactor;" in return for benefits received: for instance, a man not receiving wages, but, from a motive of friendship, by his strength or abilities has accomplished some business for any person; what this person gives him, *is an acknowledgement to a benefactor.*

" As a present by a worthy man," versed in the sense of the scriptures, given by him for religious purposes to a *Bráhmana*. So MISRA and CHANDÉSWARA. It is mentioned incidentally, lest gifts for religious purposes should be reckoned in the number of revocable gifts: but NÁREDA does not specify a present by, *or to*, a worthy man. His text will be cited (50).

" From affection," towards sons and the rest; or from kindness to a friend. MISRA.

Or " worthy," may be interpreted the state of worthiness; what is given to a stranger endued therewith, though no benefit should have been received from him, *is a present to a worthy man.* " Affection;" kindness, friendship, and so forth; what is on that account given to a friend: *and the last term of the text may be interpreted* tender regard, *intead of friendship;* what is on that account given to sons and the rest. These three terms are also similar in rhetorick, as names for love.

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* See translation of MENU, Chap. III, v. 31.

50.

NÁREDA:—They who know the law of gifts, declare, that things once delivered as the price of goods sold, as wages, for *the* pleasure *of hearing poets, musicians or the like,* from natural affection, as an acknowledgement to a benefactor, as a nuptial gift to a bride *or her family,* and through regard, cannot be resumed.

By this is declared the seven-fold distinction of valid *or irrevocable* gifts: it has been already said, that such gifts are of seven sorts (2, 3).

"From natural affection, and through regard:" in these, worthiness may be comprehended; therefore the eighth distinction, noticed by VRĬHASPATI, is not excluded: or, a present to a worthy man may intend a gift for religious purposes, not mentioned by NÁREDA, because he had premised civil donations. "In civil affairs, the law of gift is four-fold" (2, 2). It should not be objected, that presents for religious purposes are *subject to* civil cognizance; else how could the king compel delivery? The gift alone is religious; delivery is *a matter of* civil *cognizance.* Then *the law concerning* what may not be given and the like, should be admitted in the case of gifts for religious purposes? In some instances it may be admitted; in some it may be inconsistent with reasoning; in some it may contradict *express* laws.

MISRA, considering kindness as influencing every gift, reduces the distinctions to seven. But CHANDÉSWARA explains "*a gift* from natural affection" (49), a donation to sons or the like; "through regard," for religious purposes: and this, he adds, is intended by VRĬHASPATI in the expression, '*a present* by a worthy man: not distinguishing regard and 'kindness from pleasure, NÁREDA declares seven sorts; and VRĬHASPATI, 'distinguishing them, propounds eight sorts: thus there is no inconsistency: 'or they may be reconciled, by saying it is not implied that one *text* curtails 'the other.' His meaning is, that, since NÁREDA mentions natural affection in addition to regard and kindness, the number of seven *sorts* is complete: but as this might seem unsatisfactory, disparaging VRĬHASPATI, who has not specified natural affection *by the same term,* he subjoins another *mode of* reconciling *the texts,* "it is not implied, &c." that is, NÁREDA's mentioning seven sorts does not imply an exclusion of others; and VRĬHASPATI's distinctions *are comprehended* in the seven sorts of irrevocable gifts. An *ample* exposition of these opinions would be a mere display of skill; it is not of much use to the thorough examination of the subject.

A nuptial gift or gratuity is a general term, and may comprehend what is now given to a bridegroom on his marriage to the daughter of a *Rád'hiya Bráhmana.** Even a nuptial gift of money, received from the kinsmen of a bridegroom, in honour of ancestors, is taken by the parent, who maintains the boy: such is the custom. But land and the like, received for the maintenance of the bride, is not taken *by her father-in-law;* nor property given at the bridal procession. Wealth also, received on a second marriage, is not taken by the bridegroom's father; for a second marriage, is contracted for the purpose of obtaining that wealth. Nor *is* property which is received after marriage, from the wife's parents *and kindred, taken by the husband's father.* Such is the established usage.

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* The families of priests settled on the western bank of the *Bhágirat'hi* river are called from the name of the country, *Rád'hiya* (pronounced *Rárïya*).

Be it as it may be, according to CHANDÉSWARA's opinion; but, on the other opinion, how are gifts to near neighbours, revenue paid to the king, and a present to a wife on the second marriage of her lord, comprehended in the text? To near neighbours presents are made from friendship, or as an acknowledgement to benefactors; for, in this instance, the return of an obligation may be supposed as a motive. Revenue is paid to the king as wages, or as the price of the produce of land, because her has an interest in the soil. What is given to a wife on the second marriage of her lord, appears to be given for pleasure (Book V, v. 87): for the formerwife's consent to her husband's espousal of another affords him pleasure. This and other cases may be understood according to circumstances: in all instances, pleasure, *and gratification*, may be supposed *to influence the gift*.

The mention of these irrevocable gifts is intended to show the motive of donation. In these gifts it should be distinguished whether the property might, or might not, be given away: but pleasure, as a motive of donation, must be understood with an exception to lust and the like. *On this*, more will be said under the title of Void Gifts.

51.

DACSHA:—Presents given to a mother, a father, a spiritual teacher, a friend, a moral man, a benefactor, an indigent or unprotected person, and a learned man, are productive *of benefit.*

Here it is not meant that they are productive of moral benefit alone, but of other advantage also. Does not some benefit exist in every case; why is it said that presents given to a mother and the rest are productive? They are productive of the highest benefit. If gifts be made to a mother or a father, prosperity in this world, and increase of religious merit, arise from their satisfaction. By gifts to a friend, the highest *degree of* friendship is obtained. By presents to a moral man deserving of them, the highest fame *is obtained.* A present to dancers is attended with fame, but gains *only* a middle degree of reputation; and therefore is not mentioned in this place. A gift to a benefactor prevents *the charge of* ingratitude. Donations to the indigent and unprotected, from tenderness, or from regard to duty, produce religious merit. Sometimes even what is given without any consideration of duty, on account of the respectable qualities of a deserving person, produces religious merit.

52.

CÁTYÁYANA:—What is received for relieving a man from apprehension of danger, or saving him from actual peril, or for promoting a matter in which he was interested, is an acknowledgement to be a benefactor.

2. Where a reward, offered for the recovery of property missing, is received for discovering it, the gift is considered as *a payment of* wages.

3. But if *the reward be* thus offered, "I will give all my property to him who saves me from this danger, to which my life is exposed," it shall not be so *given.*

After relieving any man sinking under apprehensions from the king or the like, what is received from him is an acknowledgement to a benefactor: so what is received for preserving him from danger. A tiger lies in wait to seize some traveller, who perceives not the animal; but another man, coming from a distance, slays the tiger with a weapon, or, boldly taking this man in his arms, carries him far *from danger*: what the traveller, thus saved, gives to his preserver, is given as an acknowledgement to a benefactor. So is a present made for accomplishing some business: for instance, some person has in hand the marriage of his son; and any man coming on his own accord, even though not induced by familiar intimacy, accomplishes the object; what that person gives to him after the attainment of his object in consideration of the favour received, is an acknowledgement to a benefactor: and so in many other cases.

When a person finds not some chattel required for a particular purpose, and, greatly distressed thereat, says, "whoever shows me this chattel, I will give him so much:" after a reward has been thus offered, some person coming points out the thing; is the reward then given an acknowledgement to a benefactor, or not? The legislator replies, it is not an acknowledgement to a benefactor, but "wages" (52, 2).

A *reward for the recovery of property* missing, is there mentioned generally: *if any man* whosoever act with a view to a reward, what is given to him is considered as his wages; but, where a man acts spontaneously, *or* from habits of intimacy, what is given to him is an acknowledgement to a benefactor. Yet, even in the case of wages, should an excessive amount be promised by a man in extreme distress, it shall not be delivered (52, 3). Danger of life is mentioned, to denote extreme distress; in fact, should a man, during a conflagration, or during the sickness of his son, or the like, promise all his wealth, or one or two *lacshas*, to the person who shall save him, that promise is not valid. But it is reasonable that the gift should be great in proportion to the benefit conferred; if ten, fifteen, or twenty *pieces of money*, or the like, be promised, according to the circumstances of the case, the same should be paid. It must also be considered, that, the resumption of an excessive gift being shown where it has been promised but not delivered, the donor has an equal right to recover it, even though it have been actually delivered.

If an umpire determine a controversy between litigant parties according to law, and the party who gains or who loses the cause give him any gratuity, it is an acknowledgement to a benefactor: the gaining of the cause is an advantage to the one, and the solution of doubts is a benefit to the other party. But if the fee have been previously promised by any person, it falls under the description of wages. Yet, if any litigant party, being distressed, should in any instance promise, or actually give, an excessive fee to an umpire, the excess above the sixth part of the value in dispute may be resumed; deducting a sixth part *of that value* from the amount promised *or paid*, he may recover the remainder even through the intervention of the king. This is intimated by JÍMÚTAVÁHANA, in the *Dáyabhága*, or *treatise on* Inheritance: and RAGHUNANDANA, explaining the text of CÁTYÁYANA respecting wealth acquired by science, "what has been received as a gift from a pupil, as a gratuity for the performance of a sacrifice, as a fee for answering a question in casuistry, or for ascertaining a doubtful point of law," mentions the sixth part or the like which is received for well ascertaining *the point referred by* litigant parties, who apply for an explanation of the law.

If there be several arbitrators, they all receive and share one-sixth part: for that must be intended; else, if there be six arbitrators, the whole property would be lost *to the owner.* Since it is mentioned as received for well ascertaining the point *of law*, it follows, that if the arbitrator, receiving the fee, do not well ascertain the *doubtful* point, he shall be amerced by the king, and the fee shall be restored to the giver. Such is the reason of the law, conformable with express ordinances. But it is customary sometimes to give a considerable reward to a *Bráhmana* acting as arbitrator, and *usually* living on alms, when he resolves a doubt with great labour, or transcendent knowledge of law, or for showing the legal form of penance and expiation; since it is ordained, in the rules of penance, that a present shall be made to a venerable person: and in that case a gift is necessary.

If any liberal prince or wealthy man, solicitous of gaining his cause in a matter of small value, voluntarily give a great fee; the king, informed of the circumstances, should not fine the arbitrator. It is wealth acquired by science, and is given for pleasure; and it may be said to have been propounded by DACSHA, "to an indigent or unprotected person, or to a learned man" (51).

The gift of a milch cow and a bull, by a person applying for instructions on the forms of penance, is declared necessary by the text; "let the sinner proclaim his sin, giving a milch cow, and also a bull:" that *gift* is considered as wages. A gratuity which is paid to a priest officiating at a sacrifice, or to a spiritual preceptor, is also considered as a recompense; and whatever is given to any *Bráhmana*, for the completion of a man's own business, is granted for religious purposes. But in regard to holy property, as the giver's right is devested after consecration, it must then be merely delivered to priests. This and other rules may be established from a man's own judgment.

Art. 3.—*On void Gifts.*

53.

NÁREDA:—What has been given by men agitated with fear, anger, lust, grief, or *the pain of* an incurable disease; or as a bribe, or in jest, or by mistake, or through any fraudulent practice, must be considered as ungiven;

2. So must anything given by a minor, an idiot, a *slave or other* person not his own master, a diseased man, one insane or intoxicated, or in consideration of work unperformed.

"Fear," of him to whom it is given. The *Retnácara.*

"A bride" (*utcócha*) shall be subsequently explained.* "In jest;" by words expressing donation, but without the intention of giving. "By mistake;" delivering to one what was to be given to another, or delivering one thing instead of another which was to be given: so CHANDÉSWARA, VÁCHESPATI, and BHAVADÉVA.

"Through any fraudulent practice;" inadvertently, and the like: so VÁCHESPATI, BHAVADÉVA, and the author of the *Pracása.* But CHANDÉSWARA explains it, proposing much and giving little.

"A minor;" one who, from nonage, is unable to decide what should or not be done. "An idiot;" naturally incapable of distinguishing right from

* 59.

wrong. So CHANDÉSWARA. "Minor" is explained by BHAVADÉVA and VÁCHESPATI, one who discriminates not what is or is not done. Fool they explain "idiot."

"A person not his own master;" a son, slave, or the like. "Intoxicated;" drunk with wine or the like. "Outcaste;" banished.*—CHANDÉSWARA, VÁCHESPATI, and BHAVADÉVA.

"In consideration of work unperformed;" deluded by the false promises of the receiver: so CHANDÉSWARA. BHAVADÉVA and VÁCHESPATI explain it, a gift for a consideration, which is null.

"A diseased man;" afflicted with any malady. "Agitated by pain;" afflicted with an incurable distemper. The *Mitácshará.*

The author of the *Mitácshará* and others do not approve the reading which omits "a diseased man." †The text is cited, with the other reading, in the *Cámadhénu, Mitácshará, Viváda-Chintámeni, Dwaita-nirnaya,* and other works.

In the *Cámadhénu* and the rest, the reading is *apavarjitam* given, (instead of *apavarjitaih,* by outcastes from their tribe;) explained by HELÁYUDHA and the author of the *Mitácshará,* "what is given by a minor and the rest, must be considered as ungiven." They suppose the validity of a gift made by an outcaste; yet both opinions may be held to coincide: thus, according to HELÁYUDHA and others, it should be said, that a man banished from the family for the murder of the king, or other heinous crime perpetrated by him, has no right to give away property belonging to that family; because he is not his own master. The reading, quoted by CHANDÉSWARA, is *apavarjitaih,* or by *outcastes,* which he explains, banished *from their tribe,* but CHANDÉSWARA and the rest do not controvert the validity of a gift, when a banished man gives what he himself has acquired *after his expulsion.*

Men agitated with fear, anger, lust, grief, or pain, are five *whose minds are* disturbed from their natural state; as is remarked by VÁCHESPATI-MISRA, CHANDÉSWARA, VÁCHESPATI-BHATTÁCHÁRYA, and BHAVADÉVA.

This is declared by the same legislator, who thus describes a person not his own master:

54.

NÁREDA:—Though *generally,* his own master, what a man does while disturbed from his natural state *of mind,* the wife have declared not done, decause he is not *then* his own master.

Some infer this meaning: "where the volition of an owner, discriminating what may and may not be done, and guided solely by his own will, declares, as is actually intended by him, his own property devested, and dominion vested in a person capable of receiving, and actually intended by the donor, over the thing really intended to be given; that volition vests property in the donee." In cases of fear and compulsion, the man is not guided solely by his own will, but solely by the will of another. In the case of a man agitated by anger or the like, he is not a person who discriminates what may and may not be done. If, terrified by another, he gives his whole estate to any person for relieving him from apprehensions, his

* Some copies of NÁREDA read *outcaste;* another reading is followed in the translation.
† *Bála mú'dhá'swatantrás cha,* instead of *Bála mú'dhá'swatantrá'rta.*

mind is not in its natural state : but, after recovering tranquillity, if he give anything in the form of a recompense, the donation is valid. What is given as a bribe, or in jest, is a mere delivery, or a gift in words only : there is no volition vesting property in another. As for what is given by mistake, as gold instead of silver which should have been given, or anything delivered to a *Súdra* instead of a *Bráhmana* to whom it should have been given, the gold and the *Súdra* are not *the thing and the person* really intended, namely, silver and a *Bráhmana*. Though it be ascertained that ten *suvernas* should be paid, if anyhow through inattention or the like, fifteen *suvernas* be delivered, the gift is not valid ; for they are not what was really intended to be given : or the donation is in this case void; because the giver did not discriminate what should or should not be done. Where much is proposed and little given, (as where a man proposes to give much for what may be effected at little cost, and, after the work is accomplished, pays the simple due ;) there, since the excess was only promised, or delivered, for the purpose of deluding, the will to vest property *in another* is wanting, and the gift is therefore void, as in the case of a bribe : but with this distinction, that in the case of a bribe the whole gift is utterly null, and here it is void in part.

This will be *best* understood after an explanation *of bribe*. According to the opinion of MISRA, such a fraudulent practice is comprehended in this description, for *ch'hala* or fraud is synonymous with *upadhi*, since what is denoted by *the word* "*ch'hala*," or deceit, as employed by MENU, VRĬHASPATI expresses by the word "*upadhi*" (Book I, v. 238); and CHANDÉSWARA quotes that and subsequent texts, premising these words, "VRĬHASPATI on the subject of *legal* deceit (*ch'hala*) lawful confinement, and violent compulsion." *Upadhi*, in general, is any improper act: consequently, in every case of improper gift, where a donation is falsely promised, there is fraudulent practice. CHANDÉSWARA subjoins "and the like :" where a man intrusts his own property to another for the purpose of deceiving his creditor or the like, saying, "it is given to him," the gift is void ; and this should be included under the term "and the like." Other cases may be determined in this manner by intelligent consideration.

Here the gift is void, because the will of vesting property is wanting ; and the want of such will is inferred from the improbability of such a gift being intended, from *the character of* the person, or from the necessity which then existed of deceiving him, or from the intention of the parties : this and other points should be determined by the wise. It must, however, be noticed, that, if a man engage a *Bráhmana* in mechanical arts or the like, by proposing great wages, it is fit he should receive a large recompense; because he is induced, by the desire of wealth, to deviate from his regular duty : but he should not receive excessive wages. Other cases should be determined in the same mode.

The text of CÁTYÁYANA (52, 3) must be brought under this head, according to the opinion of CHANDÉSWARA : but, MISRA and others explaining "through any fraudulent practice" inadvertently, it may be brought under the head of mistake ; for there exists a mistake of what should not, for what should be given.

If the monthly wages of a hired servant be one *mudrá* or coin ; and he has performed work at one period for ten months, at another for one month, at another again for eleven months ; and afterwards, when it is proposed to pay the whole wages, some person skilled in accounts has noted the ciphers on

the ground in a vertical line, for the purpose of computing the sum; but, through some error in notation, mistaking the cipher of one for ten, computes accordingly; and thinking that thirty-one *mudrás* are payable, says so to the servant's master, and the master pays that sum to the servant: afterwards, some other person skilled in accounts detects the error: is not the gift *or payment* invalid? for it is given through deceit, according to the opinion of MISRA: deceit signifies misleading; and here he is actually misled by the words of another. But, according to CHANDÉSWARA, it must be *considered as given* through a mistake respecting what should be given. How then can the opinion stated apply in this instance, for the thing and the person were really intended; the owner was able to discriminate what should or should not be done; he was governed by his own will, and he willed to transfer the property in those thirty-one *mudrás*? The answer is, although the person were really intended, the giver was not aware that he was a proper donee as far as twenty-one or twenty-two *mudrás only*, and that thirty-one *mudrás* should not have been given.

In a similar case, if the hired servant reside at a distance, and the master die after sending thirty-one *mudrás* by a messenger; when the excess of nine *mudrás* above his due becomes known, if the messenger and servant *both* wish to take it, and the king neglect *to claim* the money, who shall obtain it? It should not be argued, that, because the whole money is delivered to the servant, he is entitled to take it; but the messenger can have no pretensions to it. The servant, having no acknowledged property in the surplus, cannot take it, since it is a deposit for delivery in the hands of an intermediate person; and if the messenger, computing the sum by mistake, caused the excess to be paid, then it is gained by his act. These lawyers answer, it may be so.

But others hold, that the act respecting the nine *mudrás*, which exceed his due, partakes not of the nature of theft; because, the owner not existing at the time of the receipt, they are not strange property. Nor is it a payment of *wages or* hire, for it was not regular to give so much. Therefore this is a semblance of gift; and whomsoever that intends, in him it vests *seeming* property. Afterwards, when it is proved by a plaintiff to be only the semblance of a gift, that title is devested, like the property in stolen goods. This should be established, as shown by the practice of the best men. It is not seen among good customs, that the king, on failure of heirs, should, after the death of the giver, take property given to an improper person; or that any person whosoever may take it, if it be neglected by the king. Seizing it forcibly, he does not obtain what is thus acquired by robbery. To this opinion the best authors assent; and their assent is consistent with common sense. If it be asked, what proof is there of relative property? the answer is, that right is vested by inconsiderate volition.

But that is barred by the ordinance, "what has been given by mis-"take, or through any fraudulent practice, must be considered as ungiven" (53, 1). It should not be argued, that the ordinance only shows the subsequent revival of the donor's title; for it is difficult to establish the suppression of relative property intermediately vested. This is denied; for it is, on the other hand, difficult to annex absence of mistake, or the like, as a requisite condition of vesting property by the will of the donor.

If the difficulty of proving the revival of the donor's title, and the suppression of relative property, be retorted, the answer is, in a case where it is doubted whether there be or be not difficulties arising from very

minute and logical distinctions, (as in the case of semblance of property,) the suppression and revival of the donor's title should be admitted, in conformity with reason. In the case of robbery, this difficulty is raised by the Sages themselves : but if the law, as propounded by them, must in that case prevail, even then, since civil ordinances are grounded on reasoning, such a construction should in this case be set forth : and it is indeed proper ; for a rule expresses, that "a principle of law, established in one instance, should be extended to other *similar* cases, provided there be no impediment." The suppression of a property intermediately vested may be established in this instance ; for it would be contrary to reason that a robber should have property in what he has seized against the will of another, and that *a donee should have* none in what has been given by the owner. If the messenger knowingly deceive *the principal*, for the purpose of acquiring the property himself, it is a theft on his part : to affirm that the thing becomes his, would be improper ; for, if any criminal, liable to be punished by the king, apply to a principal officer of the realm to save him from that punishment, and be told, "I will save thee by giving a hundred *mudrás* to the king's minister ;" and that officer, taking the money, save the criminal, influencing the king's minister by verbal persuasion ; when the circumstance becomes known, the criminal, from his want of power, cannot recover the money ; but the king's minister, (alleging, "this was given for me, why do you take it?") may reasonably exact it from that officer. Here the reason of the law, as abovementioned, is pertinent.

"Minor" (53, 2) is *a term* employed indefinitely, and comprehends a decrepit old man. This CHANDÉSWARA, MISRA, and others, expressly declare. "Idiot" is explained by CHANDÉSWARA, naturally destitute of power to discriminate what may and may not be done. By inserting "naturally," the word minor would not by any means be rendered unmeaning. Of what use is that insertion *in explaining idiot?* "Minor" should not therefore be limited to age ; and "idiot" should be otherwise explained. According to its etymology from the verb *muh* be stupid or want of sense, *múd'ha* signifies stupid or foolish ; and thence may signify unknowing : consequently, where a man gives anything ignorantly, the gift is void. For instance, a *Bráhmana*, supposing that kine may not be attended by a man of the sacerdotal class, because it is the duty of a *Vaisya*, has given away his cow to some person ; afterwards, discovering that a *Bráhmana* may attend kine, (for no law forbids it,) the donor says, "I gave you the cow through ignorance, therefore restore her ;" in that case the gift is void, and *the cow* must be restored.

If it be said, the gift is not void ; then the person who retains all that is *given* by mistake would be innocent ; for there is a contract of donation ; what difference is there between a thing given through mistake respecting himself, and through mistake respecting the gift ? As a payment of fifteen *suvernas*, where ten *suvernas* should be paid, is void, so the gift is utterly null where the whole ought not to have been given. Thus some expound the law. But that is wrong, for it would fall under the description of things given inadvertently or by mistake. In fact, it is not expressly said by any author, that, in such a case, the gift is void : and we do not admit *the inference ;* for it is irregular to assert, in a doubtful case, that the act done is null.

In the case of an erroneous payment of wages, *the excess* must necessarily be resumable ; for, in the payment of wages, absolute gift is not con-

templated. It should not be objected, that, in the case *stated*, the donation is void, because there is no such duty as is the declared motive of relinquishment; namely, not to attend kine. Without intending *such* dereliction, the gift may be valid, because there is the intention of making a gift transferring property to another, and a benefit to him is designed: consequently, where a thing is relinquished on a mistaken motive for dereliction, it may be resumed; where it is given on a mistaken motive for relinquishment, it cannot be withdrawn; but where it is given on a mistaken motive for donation, it may be retracted. This rule coincides with our opinion.

Where a king, from the mistaken supposition that the partition of a kingdom is forbidden, gives his dominions to one son, it is not fit that the gift be resumed, on proof brought by the other sons, from law or custom, that partition of kingdoms is not forbidden; for his motives in making the donation are to confirm the kingdom to his son, and avoid partition; and his motive for avoiding that is the supposition that a kingdom is indivisible. Though he do not mistake, *it does follow that* partition may not be omitted; for the *kingdom* is *thereby* perpetuated: to set aside a gift already made, it must be proved that all had ownership, *but in this case* the rest had no prior title to *claim* partition; *the possessor* himself may legally omit it; and the avoiding of it, which is the motive of the gift, preserves the kingdom to the son: and the donation is not void, where the motive is *founded in* fact. It should not be objected, that, by removing the grounds for avoiding partition, and by thus showing its legality, the motive of the gift, *which was made* to avoid it, is rendered null, and the donation is *therefore* void. Although the thought that partition has been forbidden, which is the motive for avoiding it, be erroneous, still the division of certain property dependent on another person is not legal without the will to divide it and the act of making a distribution; and the motive of the gift *made* to avoid partition cannot be evaded. But in the case of the semblance of gift, since the act originates in error, that act of volition is unheeded: the property of the donee is devested without consideration of persons. After much discussion, the question may be determined by the wise.

Others interpret "idiot" one whose mind is alienated through the influence of witches or the like, or who is deprived of sense through the influence of a particular act (*namely sorcery.*)

"A person not his own master;" a son, slave, or the like: so VÁCHESPATI-MISRA, CHANDÉSWARA, BHAVADÉVA and VÁCHESPATI-BHATTÁCHÁRYA.

Here some remark that MISRA and the rest have not explained the term as denoting one who is not owner, but have explained it "son, slave, or the like;" by which it is denoted, that their meaning is this: a gift made by a person technically denominated not his own master, is void. Persons so denominated are described by NÁREDA, as cited by VÁCHESPATI-BHATTÁCHÁRYA (15). If there be an unseparated brother, senior by age and virtue, and occupied in maintaining the whole family, a younger brother has no power to give or sell either share of the whole joint-estate; therefore the gift or sale is void: but, a contract made by such an elder brother is valid for both shares.

55.

VYÁSA:—But, at a time of distress, for the support of his household, and particularly for the performance of religious duties, even a single coparcener may give, mortgage, or sell the immoveable estate.

However, the younger brother has power over his own acquired property; his want of power will *hereafter* be limited to particular sorts of property; and here it must be so established from the reason of the law. But, if the brother be senior by age alone, his gift of the joint-estate is good for his own share only.

"All subjects are dependent" (15, 2): land or the like given by subjects, with the king's consent, is a valid gift; so, if a corrody be granted by a wealthy man, the gift of it, with his assent, is *valid*.

"A pupil is declared dependent" (15, 2): the pupil is subject to control, because the teacher shares the fruit *of* his *actions*, (Book III, Chap. I, v. 13 & 17;) and what a pupil, who is maintained by his teacher, gives to another without the assent of his instructor is not legal; for he is dependent in regard to all acts generally. It is meant, that even a trifling gift is void.

Women and the rest being dependent in all actions generally, even the gift of female property and the like, without the assent of the husband or master, is not valid.

56.

MENU:—Three persons, a wife, a son, and a slave, are declared by law to have *in general* no wealth exclusively their own; the wealth which they may earn is *regularly* acquired for the man to whom they belong.*

Persons not their own masters, are sons, slaves, and the like: this supposes property belonging to the son, slave, and the rest; for the gift of that which belongs to the father or master is void, because it is made without ownership (Chapter II, v. 27).

Again; by declaring the dominion of women over female property, it is shown that the gift, *made by the husband*, is void; and the alienation *of other property* is void, because the wife has a title to the husband's estate (Book V, v. 415); and the son has ownership in the paternal estate during the life of the father (31); but this (56) must be understood of property acquired by the wife, son, or slave. "A householder is not independent, &c.") (15, 3); the father has not power to give or aliene, for civil purposes, gems, pearls, land or the like, which have descended from ancestors, nor immoveable property even though acquired by himself (14).

Thus they interpret the law: but that is not satisfactory; for it has been already answered. The gift even of the immoveable patrimony, for religious purposes, is valid without the assent of sons and the rest; for excellent usage has legalized *such donations*, and no particular ordinance is found on this point: neither VIJNYÁNÉSWARA, nor any other author, expressly declares that property inherited from the paternal grandfather, and given by the father without the assent of the sons, is a void gift. Thus, in explaining the text, "the father and sons have equal dominion, &c." (31). VIJNYÁNÉSWARA says, the son may oppose a father attempting to give away property inherited from the paternal grandfather. Therefore, persons not their own masters, as a son, slave, or the like, are mentioned because they are nearly connected with the owner; it might *on that account* be doubted whether their gifts be valid: there can be no question whether a gift made by a stranger be good in law; therefore it has not been noticed.

* See Book III, Chap. I, v. 52.

" One insane" is not in his natural state. A gift made by an outcaste is void, because property is forfeited by degradation. In consideration of work unperformed :" what a man gives, deceived by the promise of the donee, " I will execute this business for thee, give me a reward," is not a valid gift if the work be unperformed : and this relates to the payment of wages. So in regard to a gift in expectation of a grateful return.

If some person, having no issue, tell any man related or not related to him, " I give thee all my property, and thou shalt " perform the last duties for me ;" but the land or the like be afterwards occupied by the donor ; what is the rule in regard to the validity of the gift ? Without occupancy, the donation cannot be valid : but if the donee reply, " I give this to preserve the " aged giver from poverty ;" not, " I relinquish this ;" then the gift is valid on proof of occupancy. The donation is null, if the consideration be void ; the ground for invalidating the gift is the failure of *any* part of the declared purpose.

Here an observation should be made. If it be asked, what is the rule, in the case where some considerations, such as maintenance for life and so forth, are performed ; and some considerations, such as the funeral rites are not performed ? *the answer is*, the gift is void, because the donee's agreement is broken by not performing the whole contract, and because there is a failure in some part of the declared purposes.

In the *Mitácshará* the distinction is declared between a diseased man and one agitated by *the pain of* a disease : " a diseased man," afflicted with any disease ; " agitated by pain," afflicted with an incurable disease. If it be leprosy or the like, the man afflicted with that distemper has not ownership in the estate ; but if the giver have ownership, it is not consistent with reason that the payment of wages or the like should be void. Nor is it proper to say, that this prohibition regards only what is given from friendship ; for there is no such limitation of the law. This and other points should be considered.

But others explain " agitated by pain," afflicted with a distemper which destroys sense, as a complicated marasmus or the like ; and " a diseased man," one whose sense has been destroyed, without such a distemper, and without intoxication, but by swallowing pernicious drugs or the like.

Bhavadéva, Chandéswara, and Váchespati remark, that a gift made for religious purposes, even by a diseased man, is valid (3). This should be admitted, and is meant by Jimútaváhana, Raghunandana, and others : but there is no question on the validity of gifts for religious purposes, since Náredá limits the rules to civil donation (2, 2) ; and this text (3) is quoted by Misra under the title of Loans and payment, and is explained by us, in the first book, as applicable to the subject of the payment of debts.

In fact, as rich and easy signifies possessing wealth and tranquillity, so the text must be acknowledged to signify, that gifts made by persons in the circumstances described, (agitated by fear, &c.) are void. A gift made by one influenced by avarice is valid, if the profit be obtained ; else it is void ; but a donation made without ownership is always null. Gift *or delivery of things* as wages, for pleasure, for purchase, as a nuptial fee, as a grateful return, as a present to a worthy man, from natural affection, or from friendship, are valid *and irrevocable*. Hence, what is given for a declared religious purpose, even in sickness, is not invalid ; for, Chandéswara holds, that a present to a worthy man is a gift for a religious purpose ; and it is excluded from void donations. Even a minor makes presents on the eleventh day

after his father's death; though given by a minor, they are *legal* gifts: his sense being unripe, the donation may be made by instructions from others, as he is taught to play at ball or the like. A gift may be made even by a person who is not his own master: thus, any man having authority over him may cause him to give the thing for a necessary purpose; so, in other cases: but a payment of wages or the like, by a man agitated by anger or the like, is valid, provided his mind be tranquil during that act and at that time; otherwise it is not, for contracts are universally forbidden during a state of insanity or the like (54).

57.

MENU:—A contract made by a person intoxicated, or insane, or grievously disordered, or wholly dependent, by an infant, or a decrepit old man, or, *in the name of another*, by a person without authority, is utterly null.

58.

VÁJNYAWALCYA:—A contract made by a person intoxicated, or insane, or grievously disordered, or disabled, by an infant, or a man agitated by fear or the like, or, *in the name of another*, by a person without authority, is utterly null.

Since there are no other texts of MENU and YÁJNYAWALCYA explaining illegal donation, the enumeration of void gifts must be taken from these. Singly, the gift of wages by a man possessing his senses is valid; joined with madness or the like, the intentional payment of wages during a lucid interval *may also be valid*; but singly, a gift by a man affected by insanity or the like is void. Such is the meaning.

If the validity of gifts made in consideration of duty, notwithstanding sickness, be intended by authors; then a similar donation, by an insane person, may be valid, from parity of reasoning, in the want of positive texts. This and other points should be determined.

MISRA observes, that gifts from an impulse of lust or anger have been explained in the case of Loan and Payment; and after premising the words 'in fact,' he inserts the tevt of CÁTYÁYANA (Book I, v. 204).

What is the rule in regard to things given by an indolent man or the like, or by a weak man and so forth; for both are omitted? If extorted by fear or the like, the gift is void; if that do not attend the donation, it is valid. In fact, a gift attended with any defect is void; but a donation springing from a *sufficient* motive is valid.

An observation should be here made. If it be asked whether a commodity sold, and a loan advanced, be stated in the number of irrevocable gifts, or in the number of void donations, and what is the rule respecting them; *the answer is*, the one might be comprehended under the term *which has been explained* the price of a commodity sold, *for it may mean* a commodity receivable for a priee; and the interest of a loan may be *deemed* a present given as an acknowledgement to a benefactor, but regulated by the law. Or what is declared by ordinances concerning loan and payment, may be added to the number of irrevocable gifts, under the remark of CHANDÉSWARA, "it is not implied that one *text* curtails another."

CÁTYÁYANA explains *utcócha* or bribe.

59.

CÁTYÁYANA :—Whatever is received for giving information of a thief or a robber, of a man violating the rules of his class, or of an adulterer, for producing a man of depraved manners *ready to commit thefts or other crimes*, or for procuring a man to give false testimony.

2. That is all denominated *utcócha* or *given on an illegal consideration*: the giver shall not be fined; but an arbitrator or intermadiate person, *receiving a bribe*, shall be held guilty.

When theft and violence are both committed, the offender is "a thief and robber." "A man violating the rules of his class;" an outcaste: CHANDÉSWARA explains the terms similarly. What is promised to the person who produces a thief, a robber, an outcaste, an adulterer, or a man of depraved manners, or to a person who suborns false testimony, is called *utcócha*: the same *authority* expressly declares, that, if promised, it shall not be delivered; if given, it shall be resumed.

60.

CÁTYÁYANA :—If a bribe be promised for any purpose, it shall by no means be given, although the consideration be performed:

2. But if it had at first been actually given, it shall be restored by forcible means; and a fine of eleven times as much is ordained by the son of GARGA and by the son of MENU.*

A bribe promised, as the recompense of an evil act, shall not be given, though the consideration be performed.

Utcócha, or *utcòcha*, is of both genders, (*masculine and feminine*,) as shown in two different texts.

If it had been first received, and the information afterwards given, it must be restored. In this explanation, MISRA, CHANDÉSWARA, and the rest, concur. If he refuse to restore it, he shall be compelled by forcible means, and a fine shall in this case be imposed: and that penalty is fixed at eleven times as much as was promised. So CHANDÉSWARA.

Whom does the fine concern? The receiver of the bribe. That the giver (the person who obtains secret information by the disbursement of money) should be fined, he denies in the former text, "the giver shall not be fined." But if an arbitrator *or intermediate person (for the word has both senses)* receive a bribe, he shall be punished. Herein the *Vivâda Chintâmani* concurs. In fact, if one be concealed, and another search for him, the intermediate person, deluded by a bribe, and producing him, shall be held guilty. CHANDÉSWARA explains it, "the intermediate person and he "who causes the bribe to be given shall not be punished, but the receiver "shall be fined eleven times as much." His meaning is, that the giver, or person who causes the bribe to be given, and the intermediate person employed, shall not be fined.

According to the *Vivâda Chintâmani*, the *privative* A is inserted; *asatya*, false *testimony*. But some read *satya*, or true *testimony*. Truth

* Another reading gives the name of GÁLAVA.

must necessarily be spoken even without wages: but if a man, receiving hire, or the promise of it, give true testimony, it is proper he should restore the money, because it has been received for a business in which wages are improper. But he who from avarice consents to act dishonestly in giving false testimony, should not be compelled to restore what he receives, because it is the price for which he sells his honesty. Thus they interpret the text. But the reading of the *Vivâda Chintâmeni* tends to maintain honesty: thus, if the practice suggested by such an ordinance be duly enforced, none would receive a bribe to procure false testimony, provided the promoter of a false suit conceal it not.

Others say, what is given for a false accusation of theft, or for the discovery of depraved manners, or to procure false testimony, may be resumed; and, if promised, it should not be delivered. On the question whether the giver shall, or shall not, be fined, (for he might be amerced, since he commits an offence,) the text declares, "he shall not be fined." Since a false accusation is infamous, there might be some amercement imposed on the suborner as guilty of an offence; but the law has excused the fine. The intermediate person between the accused and the suborner, preferring the accusation from a motive of avarice, shall be fined; or, *according to another construction*, he shall not be amerced; that is, he shall not be fined in an equal amercement; *but* he shall pay a quarter less *than the amercement mentioned in another place*, for he is guilty of an offence. The grounds on which the bribe is restored, are, that the gift is made for the purpose of deluding: what is the rule if it be given in earnest? It shall not be restored, for it is given by an owner who is his own master. But what is given or promised for the purpose of deluding, is not good in law. "If a bribe be promised for any purpose, &c." (60); this means what any person, solely considering the accomplishment of his purpose, promises for the sake of delusion: and this should be understood of business for which wages are not proper.

61.

CÁTYÁYANA:—What has been given by men under the impulse of lust, or anger, or by such as are not their own masters, or by one diseased, or deprived of virility, or inebriated, or of unsound mind, or through mistake, or in jest, may be taken back.

"One diseased;" affected with disease and the like, or impelled by hunger and so forth. A gift made by one deprived of virility is void, for he has not power over the family-estate: but if he give away what he himself acquired, the gift is valid. It is not *directed*, that one deprived of virility, buying a commodity, should not pay the price; *but, in regard to* what is given through friendship, *it* is consistent with reason.

"Of unsound mind;" naturally incapable of distinguishing right from wrong; or whose mind is alienated in consequence of disease, or of *magical* arts: or who is deluded by a promise in this form, "I will perform this work for thee."

By saying, "it may be taken back," the gift is declared void. Donations made under the influence of grief or the like, or by a minor, must be understood from the concurrent import of this text with that of NÁREDA (53).

62.

VRĬHASPATI :—What is given by a person in wrath or *excessive* joy, or through inadvertence, or during disease, minority or madness, or under the impulse of terror, or by one intoxicated or extremely old, or by an outcaste or an idiot, or by a man afflicted with grief or with pain,

2. Or what is given in sport; all this is declared ungiven, or void.

3. If anything be given for a consideration unperformed, or to a bad man mistaken for a good one, or for any illegal act, the owner may take it back.

A gift made through inadvertency, caused by joy, is not void; but what is given without discrimination, the mind being disturbed by excessive joy, *is invalid:* or it may be understood of what is given through joy originating in lust. Inadvertency or mistake have been already explained. "Extremely old;" one whose organs of sense are impaired: so MISRA. "Outcaste;" banished for his crimes: the term is so explained in the *Retnácara.* "An idiot;" the term is interchangeable with *múd'ha* already explained. "Given in sport," or in play: so the *Retnácara.* The word is synonymous with that which has been already explained, "given in jest."

"Given for a consideration;" in expectation that the donee will perform some work: if the consideration be not performed, the gift is void. "To a bad man," (or to any unworthy man;) as the gift of gold to a man of the servile class; or a present to a vicious priest, where the declared intention was to give it to a virtuous priest; for the text expresses, "mistaken for a good one." However, what is given to an unworthy man, but without distinguishing whether it be intended for a worthy person or not, is valid; for it is declared that every donation produces fruit, and none is declared universally unworthy of gifts.

63.

MENU :—A gift to one not a *Bráhmana* produces fruit of a middle standard: to one who calls himself a *Bráhmana,* double; to a well-read *Bráhmana,* a hundred thousand-fold; to one who has read all the *Védas,* infinite.

64.

Uncertain :—Gifts are ever deemed virtuous, even though presented to a *Swapáca* or the like, but especially if given at a proper time and place, in proper form, and to a worthy man.

These texts cannot be said to relate to the gift of food; for there is no such limitation. The expression, "stone transports, not stone over the deep," is intended as praise of men who deserve gifts.

"To a person who calls himself a *Bráhmana;*" who says, "I am a *Bráhmana;*" but *in fact* belongs not to the sacerdotal class: and he must neither be vicious, nor degraded. "Ever," at all times, and in all countries, "gifts are virtuous," or productive, even though presented to a *Swapáca,* (a

mixed class equal in degree to the *Chándála,*) that is, presented to any person: but especially if given "at a proper place," in a country frequented by the black antelope, or on the banks of the Ganges or the like; "at a proper time," during an eclipse of the sun or moon; "in proper form," looking towards the east, delivering *cusa, tila,* and water, and so forth; "to a worthy man," to one who has read all the *Védas,* such gifts "especially" produce fruit; they produce the greatest reward.

"For any illegal act;" from this exposition of CHANDÉSWARA, compared with the gloss of CULLÚCABHATTA on the text of MENU (48), "if the man asking a gift for some religious act do not perform it, the owner may resume a gift thus applied to a purpose different from a religious one," his *meaning* may be thus stated, "for an act not religious:" for he admits such an explanation of the text formerly quoted from GÓTAMA. Consequently, if a man ask and receive a gift for a religious act, or for consumption, and give it to a harlot, the donation is void.

What is given for a false accusation of adultery is a void gift: what NÁREDA and CÁTYÁYANA call a bribe, or *utócha,* is explained, according to the texts of other *Sages,* given for an illegal act. But this appears wrong; for that cannot be established in a text of NÁREDA to the same purport.

65.

NÁREDA:—But what shall be given ignorantly to a bad man, called a good one, or for an illegal act, must be considered as ungiven.

From the term "ignorantly," and from the word "but," it appears that this text does not set forth the invalidity of a gift delivered as a bribe for an accusation of adultery; and there is no difficulty in saying that the text of VRĬHASPATI relates to the same *subject.*

If that for which the gift is made be not *performed, the giver* may resume it: so the *Vivádá Chintámeni.* Consequently, if a man, saying, "I will give it to dancers," do not so appropriate the gift, it may be resumed: but, the matter being trifling, a generous giver will not resume it. Such is the custom.

All these opinions should be admitted: but it must be considered, that, since the text last cited expresses "what is given to a bad man called a good one," it would be elegant in the former text to limit "mistake" to the thing to be given; else there is a vain repetition.

66.

GÓTAMA:—The words of a man influenced by wrath, excessive joy, terror, sickness, or avarice, or of a minor, of a decrepit old man, of an idiot, or of one intoxicated or mad, are vain.

67.

NÁREDA:—He who foolishly receives what is *deemed* ungiven, and he who gives what may not be *legally* aliened, should be punished by a king, who knows the law.

Void gifts of sixteen forms, as mentioned by NÁREDA; and unalienable property, of eight sorts, as declared by the same. The *Retnácara.*

The cases mentioned by other Sages should also be admitted: and what is extorted by force is likewise considered as ungiven (Chapter II, v. 10); and that is comprehended, in the text of NÁREDA, under gifts through fear.

A fine is ordained for him who gives what may not legally be aliened, not for the receiver; therefore it is not inferred that it should be restored. It follows, that a gift of what *regularly* should not be aliened, is nevertheless valid. If any one give away joint-property, another owner comes and says, "what power had he to give the whole? restore therefore my share" He cannot say, "restore the whole estate." Such is the usage seen in practice: but custom is derived from the ancients, *who were* versed in the law; it cannot therefore be forcibly abrogated. But in some instances custom has been partly changed by self-authorized moderns, who pretend to wisdom, and neglect the law. To reconcile it, respect should be shown to the rules of jurisprudence, observing also time and place.

68.

MENU:—Let him fully consider the nature of truth, the state of the case, and his own person; and, next, the witnesses, the place, the mode, and the time; firmly adhering to all the rules of practice.

Let the king, inspecting judicial proceedings, detect fraud, and view the truth; let him consider "the case," or what belongs to it, (for the term may be taken as a derivative bearing this sense;) that is, the forensick practice respecting such things, whether cattle, gold, or the like: *let him avoid* trifling errors, lest he be derided for his want of sagacity; and let him consider his own person, *remembering that* by just decisions he will partake of celestial bliss, and so forth: let him consider the witnesses, *whether they* be observant of truth, *or not*: let him consider the place and time, whether they be suitable; and the form, whether the point contested be in its nature probable or improbable, and so forth. CULLÚCABHATTA.

Others thus explain the text: let him consider the truth; "this man speaks truth; that man speaks deceitfully:" let him decide the matter, detecting fraud and so forth. The same is intended by CULLÚCABHATTA. Let him consider the wealth *of the party*; his assets for *the payment of* a fine: consequently the meaning is, that an amercement should be imposed according to the ability *of the offender*. Let him consider "his own person;" let him reflect, "who am I?" I who am appointed by the supreme ruler to discriminate justice and injustice, have no other friend; neither the accused nor the accuser *is a friend to be treated* with partiality. This is also intimated by CULLÚCABHATTA. *Let him consider the witnesses*; let him confront and examine them, to ascertain whether they speak from contrivance, or relate the fact. Let him decide the matter by incidentally investigating the place and time, and so forth: in what place, and in what occupation, to approach the wife of another is a high offence; let him investigate all that, to impose the severest fine for *an offence* committed in that place and in that occupation. Again; since criminals, deserving capital punishment, are numerous in times abounding with iniquity, the depopulation of the realm might be apprehended; in that case, instead of capital punishment, let him confiscate the whole estate *of the offender*, command *ignominious* tonsure, and inflict other punishments, according to the nature of the offences, including theft. Let him consider "the form," or nature of the acts: even if the act be proved to have been *done in* jest or the like, he must inspect the judicial proceeding.

END OF VOLUME FIRST.